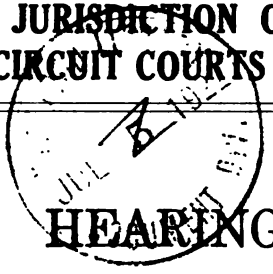
TO LIMIT THE JURISDICTION OF UNITED STATES DISTRICT AND CIRCUIT COURTS IN CERTAIN CASES



HEARING

P132-38

BEFORE THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

SIXTY-SEVENTH CONGRESS
SECOND SESSION

ON

H. R. 10212

Serial 34—Part 3

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TO LIMIT THE JURISDICTION OF UNITED STATES DISTRICT AND CIRCUIT COURTS IN CERTAIN CASES.

SERIAL 34—PART 3.

SUBCOMMITTEE OF THE COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Tuesday, May 23, 1922.

The subcommittee this day met, Hon. George S. Graham presiding.

Mr. GRAHAM. The committee will come to order. Mr. Thom has asked to be heard, and he may proceed.

STATEMENT OF MR. ALFRED P. THOM.

Mr. THOM. Mr. Chairman and gentlemen: My name is Alfred P. Thom. I am general counsel for the Association of Railway Executives, and on behalf of that association I appear here in opposition to the Bacharach bill H. R. 10212; proposing to deprive the inferior Federal courts of the power to issue injunctions in certain cases. I have noted the proviso in the bill which purports to limit its effect so that it will not relate to matters affecting interstate commerce. How far that expression will be

interpreted by the courts to extend is a matter of uncertainty. Unless it should be interpreted to extend to everything affecting the instrument of interstate commerce the bill would still be very hurtful to the interests which I represent. It will not do to think that a railroad carrier engaged in interstate commerce can be affected adversely only through rates on interstate commerce. It may be that, under some existing law or under some change in existing statutes, State rates might not affect, under some decisions of the courts, interstate commerce. In addition to that there are innumerable matters by which the property of an interstate carrier might be confiscated through State action, which might conceivably be held not to come within the saving terms of this proviso. There are many questions of taxation imposed by a State, under authority of a State law and by assessments of State boards, which might have the effect of violating the constitutional rights of one of these carriers, and yet it might be held that those questions would not come within the saving clause of this proviso. So that the carriers I represent must feel an interest in this legislation; and I must say, Mr. Chairman, that if no client were interested in it, as a citizen and as a lawyer I would feel that the consequences of this legislation would be so great that I would feel justified in asking your attention while I express my opposition.

This is not the first attempt, Mr. Chairman, to enact legislation of this nature. In 1912 bills were introduced in the Senate to amend section 265 of the Judiciary Code, which at that time read as follows:

"Sec. 265. The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

A bill was introduced so as to make that section read as follows:

"Sec. 265. The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy; or to restrain the enforcement, operation, or execution of any statute of a State, or any rule, order, or regulation having the force of a statute of a State, or order, rule, or regulation made by a commission or body authorized by State laws to regulate and control common carriers or other public service corporations."

In connection with that bill I had the privilege of discussing before the Judiciary Committee of the Senate the question of the judicial power of the United States and the power of Congress in relation to the United States courts. That argument was printed as a Senate document on motion of Senator George Sutherland, and I attempted to get copies of it so that I might furnish them to the members of this committee and thus avoid the necessity of consuming your time in the presentation of the matter anew. I find, however, that it is out of print, and, consequently, to get your attention to it at all I am obliged to produce it in substance before you in oral argument.

Mr. MICHENER. Could you not include in the record an extension of what you desire to say without reading all of it?

Mr. THOM. I do not feel I could in justice to the argument.

Mr. CHANDLER. Will you give me the number of the Senate document?

Mr. THOM. This is Senate Document No. 443, Sixty-second Congress, second session. The proposal in 1912 went further than the present bill. It embraced all that the present bill embraces but went further and prohibited the issuance of the writ of injunction by any court of the United States for the purposes mentioned. In the bill now before you jurisdiction is denied to district or circuit courts of the United States or a judge thereof to entertain "any bill of complaint to suspend or restrain the enforcement, operation, or execution of any order made by an administrative board or commission in any State, acting under and pursuant to the statutes of such State, where such order was made after hearing upon notice, or to entertain jurisdiction of any bill of complaint to suspend or restrain the enforcement, operation, or execution of the statute under which such order was made, in any case where under the statutes of that State provision is made for a judicial review of such order upon the law and the facts," together with the proviso to which I have referred. The question now arises: Has Congress the constitutional power to do this? A proper answer to this question involves an inquiry into the most vital affairs of our governmental system and into the most vital relationships between the coordiante branches of the Government. It involves an inquiry into the constitutional status of the judiciary in the Federal scheme of government and into the extent of the power of Congress over it.

It will not be denied that it is a fundamental conception of our Federal system of government that there shall be three grand departments, each exercising a separate branch of governmental power and each performing and each essential to the performance of a separate branch of governmental duty. (Meriwether *v.* Garrett, 102 U. S. 515; Mugler *v.* Kansas, 123 U. S. 662; McCray *v.* United States, 195 U. S. 55.)

This is not only established by the authorities but appears on the face of the Constitution itself. In express words the Constitution provides for three branches for the exercise of the governmental powers and the performance of the governmental duties of the United States.

Section 1 of Article I provides that:

"All legislative powers herein granted shall be vested in a Congress of the United States."

Section 1 of Article II provides that:

"The executive power shall be vested in a President of the United States of America."

Section 1 of Article III provides that:

"The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish."

It is thus made clear that the constitutional scheme of this governmental system could never have been put into effect without any one of these three governmental departments, and that it can not continue to endure in its constitutional form without all of them. Each must exist, and exist in full constitutional competency, or the form and character of the Government contemplated and created by and in pursuance of the Constitution can not exist.

In considering the questions raised by these bills it is, therefore, necessary to examine with care the constitutional requirements in respect to the judicial system of the United States.

The judicial system is provided for in the first and second sections of the third article of the Constitution which, so far as pertinent, are as follows:

"SECTION 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

"SEC. 2. (1) The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.

"(2) In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appelate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

"The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed."

Under these provisions of the Constitution it is unquestionably true that it required congressional action to put the judicial department of the United States into operation. Whether the effect of such congressional action was merely to create courts inferior to the Supreme Court and to define the fields of their respective jurisdictions, the courts thus created deriving from the Constitution their judicial power to deal with subjects brought within their jurisdiction by Congress, or whether Congress not only created the courts inferior to the Supreme Court, but also clothed them with both jurisdiction and power, has been much discussed, particularly in a debate in the Senate in the spring of 1906 in connection with certain proposed features of the Hepburn bill. The debate was notable. It was participated in by the great lawyers and master minds of the Senate. Each side brought to the support of its views a wealth of learning and of argument. One side insisted that there is an essential difference between judicial power on the one hand and the jurisdiction of the courts on the other; that Congress was required, under the Constitution, to create and define jurisdiction, but that as to all subjects thus brought by Congress within the reach of a court's defined jurisdiction, the courts, by authority of the Constitution, were endowed with judicial power to deal judicially and effectively with them. The other side, on the contrary, contended that there is no difference between judicial power and jurisdiction, and that Congress was clothed by the Constitution with authority to create the courts and to define and from time to time to limit their jurisdiction and their judicial power, understanding these terms as being synonymous.

Both sides seemed to agree upon the definition of the judicial power given by Mr. Justice Miller in his work on the Constitution, as follows:

"The judicial power 'is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision.'"

I do not go into this interesting discussion as to the difference between judicial power and jurisdiction, because I do not think it essential to the present purpose. It seems to me that the truth lies nearer the surface than the point to which this discussion drifted in this debate. It may, and possibly, under the decisions of the Supreme Court, must, be admitted that Congress had power to create the courts inferior to the Supreme Court, to define their respective jurisdictions, and to clothe them with the powers and processes essential to their judicial organization. It likewise has power to change the system of courts from time to time, the Constitution in express terms stating that the Congress may "from time to time ordain and establish" courts inferior to the Supreme Court. From this power to create, organize, and to change, however, it is argued that Congress has power to destroy; and thereupon, assuming this power to destroy, the argument is expressed in this form:

"The power to create and the power to destroy must, in the nature of things, include the power to limit and control."

It seems, however, that this argument is essentially unsound in assuming or in contending that Congress has this power to destroy.

The power in Congress to destroy the Federal courts inferior to the Supreme Court can not be deduced from the power to create or from the power to change, or from both.

It must be carefully borne in mind that the whole power of Congress in the premises is a delegated and not an original power. It is a power delegated by the people, who are the principals, and who speak through their Constitution to Congress as an agent.

Mr. CHANDLER. I do not desire to interrupt, but I have not the context clearly in mind. Are you arguing this or reading from Miller on the Constitution?

Mr. THOM. This is my argument. The Constitution is the instrument of delegation, and Congress has no power in respect to the subject matter except that expressly conferred in the Constitution, or clearly implied from the nature of the powers thus expressly conferred. It is, therefore, necessary to examine carefully into the nature and extent of this delegated power.

The dominant purpose of the people in formulating and adopting the Constitution was to establish a Government of three coordinate departments—legislative, executive, and judicial. The means to accomplish this dominant purpose were to define, limit, and grant directly to Congress the legislative power proposed to be exercised by the Government; to declare that the executive power shall be vested in the President and the judicial power in one Supreme Court and in such inferior courts as Congress might from time to time ordain and establish; to define the subjects to which the judicial power should extend; and to define a part of the jurisdiction of the Supreme Court.

Among the enumerated powers of Congress (Art I, sec. 8, subsec. 9) was a power to "constitute tribunals inferior to the Supreme Court." The powers thus delegated to Congress in respect to the courts must, of course, be construed with reference to the dominant purpose of the people in their Constitution. That purpose was, as stated, to establish a Government completely adequate and competent in each of the three essential departments—legislative, executive, and judicial.

The Constitution was framed not for a day but "for ages to come, and was designed to approach immortality as nearly as human institutions can approach it." From a delegated power and an imposed duty to take a creative step in the organization of a government which is designed to be permanent can not be deduced a power to destroy a department of that government or to destroy any of its essential parts.

Mr. HERSEY. You are stating your own conclusions as to the Constitution?

Mr. THOM. Yes, sir.

Mr. HERSEY. Let me understand you clearly. The Constitution provides that there shall be one Supreme Court, the Supreme Court of the United States, and such inferior courts as Congress may from time to time ordain and establish. Now, is it your opinion that all courts below the Supreme Court of the United States are inferior courts and that Congress has power to establish those inferior courts?

Mr. THOM. Yes.

Mr. HERSEY. Are you arguing now that Congress has not the power to interfere with, limit the jurisdiction of, change the procedure in, or in any way amend the laws establishing those courts?

Mr. THOM. My meaning is just about to be expressed. As it would require considerable time to express all the limitations in such an answer I have expressed them all here.

Mr. HERSEY. Go ahead.

Mr. THOM. From a delegated power and an imposed duty to take a creative step in the organization of a government which is designed to be permanent can not be deduced a power to destroy a department of that government or to destroy any of its essential parts. The existence of such a power of destruction is absolutely inconsistent with the fundamental purpose of creation for which the power was granted and with the fundamental idea of governmental permanency on which the creation was based. Those who contend for this power of destruction must justify their claim by pointing out the express provision of the Constitution which confers it or from which it must be implied. It certainly is not conferred by, and can not be implied from, the express power to constitute, ordain, and establish, and there is no other.

This necessary and inevitable conclusion as to the extent of the delegation of power to Congress, derived from a consideration of the purpose for which it was granted, is borne out also by the language of the Constitution itself. That language is that Congress may "from time to time ordain and establish" courts inferior to the Supreme Court—not that it may destroy these courts without ordaining and establishing others adequate to the completeness of the governmental system. In fact, the power of Congress to abolish these courts at all grows out of, and is implied from, the express power to ordain and establish others. Moreover, the Constitution expressly provides that the Supreme Court shall have an appellate power, thus necessarily implying the continued existence of inferior courts from which an appeal might be taken. The power of Congress, then, in respect to the judicial department of the Government ordained by the Constitution, being a power delegated to it in aid of the establishment and perfection of the governmental system, two consequences must follow;

First. It was not only within the power, but it was the imperative duty of Congress under the Constitution to constitute courts inferior to the Supreme Court adequate to the proper exercise of the judicial power of the United States. Its failure to do so would have been unconstitutional. The fact that such failure would have been an act of omission of duty and, therefore, a duty not subject to be enforced by any existing means, would relieve such failure of none of its unconstitutionality. The result of such failure would have been the failure to establish a constitutional scheme of government. A judicial department, competent to exercise all of the essentials of the judicial power, being a necessary part of the constitutional scheme, the government designed by the Constitution could not have been formed if Congress had failed to establish the courts inferior to the Supreme Court and to put into effective operation the Federal judicial system.

Second. But having once established the judicial system, and having once endowed the courts with means adequate to the competent exercise of the judicial power, an entirely different situation has arisen. This is now an existing Government, completely in operation, fully equipped in all three of its departments for the exercise of governmental power. The Government is now the Constitution in concrete form. If Congress were now to undertake to abolish the courts inferior to the Supreme Court without eo instanti constituting others equally competent to the exercise of the judicial power it would be doing an act destructive of this constitutional scheme of government, and therefore in the highest degree unconstitutional. The act of Congress making this attempt would be absolutely null and void. It would not merely be in contravention of a single clause in the Constitution—it would be destructive of the Constitution itself, because it would be the destruction of the Government which the Constitution was designed to create and to perpetuate. This act of destruction of the Constitution would be an affirmative act. Inasmuch as it would be null and void, because unconstitutional, it would have no effect and consequently could not change the existing status of the courts. Notwithstanding such a void act, the courts would be left in full constitutional competency to exercise the judicial power just as if no such act had been passed, Unquestionably, Congress has the power to change the system of Federal courts inferior to the Supreme Court provided that, at the instant the change becomes effective and the old courts pass out of existence, new once take their place equally well equipped and organized to exercise the judicial power.

Mr. HERSEY. If we have the power to change the courts we establish, have we not the power to limit their jurisdiction?

Mr. THOM. Not so as to deprive the judicial department of substantial and essential parts of the judicial power.

Mr. HERSEY. Over certain matters only?

Mr. THOM. Well, I am going to argue before I get through whether the taking away of the power of injunction is essential to the competency of the judicial power.

Mr. HERSEY. All right.

Mr. SUMNERS. Right in that connection and in order that I may get you clearly—I understood the committee was to meet at 10.30. so that, unfortunately, I was not here at the beginning—is it your contention that if Congress should confer a judicial power upon the Federal district court which was at the time being exercised by a State court that then under the general governmental scheme in operation litigants, by a repeal of the act conferring the jurisdiction upon the Federal court, could not be sent back to the State court to litigate the question in issue?

Mr. THOM. I will answer your question in this way, sir: It became necessary in order to establish the constitutional scheme of our Government to create a judicial department fully competent, and the Constitution conferred upon the judicial department thus created the whole of the judicial power as defined in the Constitution. Now, it is not within the competency of Congress to so limit or detract from the judicial power which the Constitution says shall extend to certain matters—to so limit or detract from that power—as to destroy or to impair the constitutional functions of a coordinate branch of this Government.

Mr. SUMMERS. Suppose in the beginning that as to a matter which would arise and become the subject of litigation, as contemplated by Congress and as contemplated by this bill, the initial litigation would have to be in the State courts, then proceed up through the State courts to the court of highest resort within the State and the complaining party having the right of appeal to the Supreme Court, if that were the original arrangement and Congress should change that arrangement so as to give the Federal district court jurisdiction in the first instance, is it your contention that Congress would not have the right to reverse itself and send the litigant back through the machinery of the State judiciary to the highest court in the State, leaving, as the Constitution leaves, a final right of appeal to the Supreme Court?

Mr. THOM. I would differ from your original premise. Congress would have no power in the first instance to leave any part of the judicial power defined by the Constitution to the State authorities without providing a Federal judicial authority fully competent to exercise that power.

Mr. SUMMERS. In the first instance, when Congress met, there was no district court, of course. Now, suppose Congress created the district court but did not determine its jurisdiction?

Mr. THOM. I have just argued that question.

Mr. SUMMERS. Then I will read your argument.

Mr. THOM. I have stated that a duty imposed upon Congress which it declines to perform can not be enforced by any known existing means, but its failure to perform it would be a failure to perform a constitutional obligation put upon Congress by the Constitution itself. Having once performed it, however, and created a perfect and completely equipped judicial department and afterward by an affirmative act, undertakes to strike it down, the affirmative act becomes unconstitutional.

Mr. GRAHAM. Unless at the same time a proper substitute is provided?

Mr. THOM. Yes. It would not be striking it down if it merely changed the judicial system.

Mr. SUMNERS. I think I understand your position now.

Mr. THOM. It is fully within the constitutional competency of Congress to choose subordinate tribunals and change them at will, but in making the change it is not competent for Congress to strike down a part of the judicial power of this Government and repose it nowhere. It must have a system of courts selected by itself—selected by Congress—and it must have a system of courts competent to exercise the judicial power as defined by the Constitution. You have always done that. That has been the history of the legislation of Congress. You had a commerce court a short time ago to which you confided a part of the judicial power of this Government; you abolished that commerce court.

Mr. HERSEY. Had we not the right to do that?

Mr. THOM. Of course you had, but in the act of abolition you conferred its jurisdiction upon another court of the United States. You had no right to omit that step; you had a right to abolish that court; you had a right to abolish the circuit court, as you have done more than once in the history of this Government, but every time you have touched a court inferior to the Supreme Court you have taken its jurisdiction and conferred it on some substitute tribunal created by Congress.

Mr. CHANDLER. Your contention is that it would not be sufficient to leave jurisdiction in the hands of the State court?

Mr. THOM. Undoubtedly.

Mr. CHANDLER. And that every time you destroy a Federal court another Federal court must be subsituted?

Mr. THOM. That is what I am arguing.

Mr. SUMNERS. And that an act of Congress attempting to limit the jurisdiction of one Federal court and not conferring that jurisdiction upon another Federal court is in itself unconstitutional and void?

Mr. THOM. Void absolutely.

Mr. SUMNERS. Not voidable but void?

Mr. THOM. Void absolutely. You have no more right to strike down and take from the judicial department of this Government a part of the judicial power than you have the right to take from the executive department a part of the executive authority conferred by the Constitution.

Mr. HERSEY. This bill does not attempt to strike down or abolish any inferior court of this Government, but only attempts to remove jurisdiction from a certain part of that court, certain jurisdiction in certain matters, but not as to all matters.

Mr. THOM. My argument will not be complete unless I am able to show that what the bill attempts to do is to take away a substantial and essential part of the judicial power of the courts of the United States, and I will proceed to discuss that before I get through.

Mr. FOSTER. And not lodge it in any other court?

Mr. THOM. And not lodge it in any other court. The fudamental principle for which I am contending is that the Constitution has established a judicial department of this Government, has defined the judicial power of the United States, and says that that power must be conferred upon a Supreme Court and such inferior courts as Congress may from time to time ordain and establish.

Mr. YATES. In what way does this bill take away judicial power?

Mr. THOM. Would it be satisfactory for you to wait until I get to that part of my argument?

Mr. YATES. Certainly. Some of us are not members of this subcommittee but are here by invitation.

Mr. GRAHAM. Quite so.

Mr. THOM. Naturally I have got to develop these points one by one.

Mr. SUMNERS. I apologize for having asked questions that carried you over ground that you had already covered.

Mr. THOM. I do not object to that at all, but I just want you to understand that I had not overlooked the difficulty that is in your mind. I will catch up the thread of my statement by repeating a little. Unquestionably Congress has the power to change the system of Federal courts inferior to the Supreme Court, provided that, at the instant the change becomes effective and the old courts pass out of existence, new ones take their place equally well equipped and organized to exercise the judicial power.

Mr. HERSEY. Can you cite authorities for that?

Mr. THOM. I will in a moment. It will be noted that this has always been the course of Congress, as illustrated by the act of March 8, 1802, abolishing the circuit courts but at the same time restoring the courts as they had existed prior to February 13, 1801, and in the Judiciary Code of March 3, 1911, by which the circuit courts were abolished but the district courts at the same moment were equipped with equal competency to exercise the judicial power.

It is therefore respectfully submitted that the power of Congress to destroy the Federal courts inferior to the Supreme Court can not be deduced from the power conferred upon Congress by the Constitution to create and to change these courts. In fact, no such power of destruction in Congress can, consistently with the Constitution, by any possibility exist. The argument, therefore, above quoted—"the power to create and the power to destroy must, in the nature of things, include the power to limit and control"—necessarily, as applied to the subject matter now being considered, must fail, because there is no power to destroy, and it will not be contended that the power to create and the power to substitute others with equal competency must, in the nature of things, include the power to limit and control at will. If, then, Congress has no power to destroy, without at the same time creating another equally competent, the judicial system which it has created inferior to the Supreme Court, the question arises: Has Congress the power to take away from these courts any power essential to their completeness and competency to exercise effectively the judicial power to the extent that it has already been conferred upon them by the Constitution and laws of the United States? To ask this question is to answer it. In connection with it let me read what I omitted, the definition of the judicial power given in the Constitution:

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, or treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which

the United States shall be a party; to controversies between two or more States; between a State and a citizen of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State or the citizens thereof and foreign States, citizens, or subjects."

Now, my contention is that the judicial power of the United States as there defined must be reposed, by the mandate of the Constitution, in one Supreme Court and in such inferior courts as Congress may from time to time ordain and establish; that it must be reposed somewhere and in a tribunal created by Congress under the express mandate of the Constitution, and that to repose it in the courts of a State is not in obedience to the mandate of the Constitution.

In this connection, the distinction must be borne in mind between the control which Congress legitimately has over the methods, practice, and procedure of the courts in matters not essential to their judicial competency, on the one hand, and, on the other, those powers which are essential to the existence and effectiveness of the courts in the competency contemplated by the Constitution. Undoubtedly, in respect to such methods, practice, and procedure as are nonessential to the competency of the courts for the exercise of the judicial power, Congress has control; but it is apparent that, if the power sought to be taken away is essential to the completeness of the court and to the effective exercise of the judicial power conferred by the Constitution, or by the laws of the United States enacted in pursuance of the mandate of the Constitution, to take it away after it has once been conferred would be to destroy the court pro tanto. If Congress can destroy one essential power of a court it can, in the exercise of a similar authority, destroy another, and thus proceed step by step to destroy them all. If it can not destroy by one act it can not destroy by successive acts. If it can not destroy the whole, it can not destroy any one essential part. As it has no power to destroy these courts, or to impair their effective competency to perform the constitutional functions of the judicial branch of the Government, it must leave them in their full constitutional integrity to the extent that judicial power has been conferred by law, or must, in making the change, ordain and establish others of like constitutional and judicial competency.

Now, you asked whether I had any authorities for that. I will read from Martin v. Hunter's Lessee (1st Wheaton, p. 327). It is a very interesting discussion and I find I made no reference to it in the argument I made before the Senate committee, but it is directly connected with the argument it is now my privilege to submit for your consideration:

"The third article of the Constitution is that which must principally attract our attention. The first section declares, 'the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish.'

"The second section declares that 'the judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and the treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party'"—

And so on to the end of the article.

"It then proceeds to declare that 'in all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction.' In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

"Such is the language of the article creating and defining the judicial power of the United States. It is the voice of the whole American people, solemnly declared, in establishing one great department of that government which was, in many respects national and in all supreme. It is a part of the very same instrument which was to act, not merely upon individuals but upon States; and to deprive them altogether of the exercise of some powers of sovereignty, and to restrain and regulate them in the exercise of others.

"Let this article be carefully weighed and considered. The language of the article throughout is manifestly designed to be mandatory upon the legislature. Its obligatory force is so imperative that Congress could not, without a violation of its duty, have refused to carry it into operation."

I say that in reply to Mr. Sumners, and I call his especial attention to that.

"The judicial power of the United States shall be vested"—not may be vested—"in one Supreme Court and in such inferior courts as Congress may from time to time ordain and establish."

Mr. HERSEY. The word "may" is in the other part. Congress may do it, not shall do it. Congress shall establish a Supreme Court and may establish inferior courts.

Mr. THOM. It must establish inferior courts.

Mr. HERSEY. It does not say so.

Mr. THOM. I am reading from an authority which I think you will find satisfactory.

"Could Congress have lawfully refused to create a Supreme Court or to vest in it the constitutional jurisdiction? 'The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.' Could Congress create or limit any other tenure of the judicial office? Could they refuse to pay, at stated times, the stipulated salary or diminish it during the continuance in office? But one answer can be given to these questions. It must be in the negative. The object of the Constitution was to establish three great departments of Government, the legislative, the executive, and the judicial departments. The first was to pass laws, the second to approve and execute them, and the third to expound and enforce them. Without the latter it would be impossible to carry into effect some of the express provisions of the Constitution. How, otherwise, could crimes against the United States be tried and punished? How could causes between two States be heard and determined? The judicial power must, therefore, be vested in some court by Congress, and to suppose that it was not an obligation binding on them but might, at their pleasure, be omitted or declined, is to suppose that, under the sanction of the Constitution, they might defeat the Constitution itself; a construction which would lead to such a result can not be sound.

"The same expression, 'shall be vested,' occurs in other parts of the Constitution in defining the powers of the other coordinate branches of the Government. The first article declares that 'all legislative powers herein granted shall be vested in a Congress of the United States.' Will it be contended that the legislative power is not absolutely vested, that the words merely refer to some future act and mean only that the legislative power may hereafter be vested? The second article declares that 'the Executive power shall be vested in a President of the United States of America.' Could Congress vest it in any other person, or is it to await their good pleasure whether it is to vest at all? It is apparent that such a consideration, in either case, would be utterly inadmissible. Why, then, is it entitled to a better support in reference to the judicial department?

"If, then, it is a duty of Congress to vest the judicial power of the United States, it is a duty to vest the whole judicial power. The language, if imperative as to one part, is imperative as to all. If it were otherwise, this anomaly would exist, that Congress might successively refuse to vest the jurisdiction in any one class of cases enumerated in the Constitution and thereby defeat the jurisdiction as to all, for the Constitution has not singled out any class on which Congress are bound to act in preference to others."

Mr. VOLSTEAD. How do you construe the statute, taking away from the Federal court cases between citizens of different States where there are controversies involving less than $3,000 in value or amount?

Mr. THOM. That was a cotemperaneous construction of the Constitution.

Mr. VOLSTEAD. It is still recognized as valid by our courts.

Mr. THOM. I know it is, and it is done by virtue of the cotemporaneous construction of the Constitution which became thereby a part of the Constitution itself.

Mr. YATES. I would like to ask one question. The thing which Mr. Volstead mentioned was the withdrawal of certain classes of cases, was it not?

Mr. THOM. That was in connection with the creation of the Federal Judicial Code, which immediately followed the Constitution; it was an interpretation of what the judicial power was and they in effect said that to thus limit jurisdiction in amount was deminimis and did not constitute a withholding of an essential part of the judicial power.

Mr. VOLSTEAD (interposing). Take the class of cases covered by this bill. In nearly every instance it would be a contest between citizens of different States, and this would only withdraw another class of cases. The same as was done when cases below $3,000 was withdrawn.

Mr. THOM. My argument will be that the power to issue injunctions according to recognized judicial procedure is an essential part of the judicial power and that it is not within the power of Congress to destroy or substantially impair it. I have not yet gotten to that branch of my argument, but am now reading from the decision in the case of Martin *v.* Hunter's Lessee:

"The next consideration is as to the courts in which the judicial power shall be vested. It is manifest that a Supreme Court must be established, but whether it be equally obligatory to establish inferior courts is a question of some difficulty. If Congress may lawfully omit to establish inferior courts it might follow that in some of

the enumerated cases the judicial power could nowhere exist. The Supreme Court can have original jurisdiction in two classes of cases only, viz., in cases affecting ambassadors, other public ministers and consuls, and in cases in which a State is a party. Congress can not vest any portion of the judicial power of the United States except in courts ordained and established by itself, and if in any of the cases enumerated in the Constitution the State courts did not then possess jurisdiction the appellate jurisdiction of the Supreme Court, admitting that it could act on State courts, could not reach those cases, and consequently the injunction of the Constitution that the judicial power 'shall be vested' would be disobeyed. It would seem, therefore, to follow that Congress are bound to create some inferior courts in which to vest all that jurisdiction which, under the Constitution, is exclusively vested in the United States, and of which the Supreme Court can not take original cognizance. They might establish one or more inferior courts; they might parcel out the jurisdiction among such courts, from time to time, at their own pleasure. But the whole judicial power of the United States should be, at all times, vested, either in an original or appellate form, in some courts created under its authority.

"This construction will be fortified by an attentive examination of the second section of the third article. The words are, 'the judicial power shall extend,' etc. Much minute and elaborate criticism has been employed upon these words. It has been argued that they are equivalent to the words 'may extend' and that 'extend' means to widen to new cases not before within the scope of the power. For the reasons which have been already stated we are of opinion that the words are used in an imperative sense; they import an absolute grant of judicial power."

In view of this it becomes important to inquire whether the power to grant injunctions in the case mentioned in this bill is an essential part of the judicial power now possessed by the courts.

Mr. HERSEY. How do the circuit courts of the United States get the power of injunction?

Mr. THOM. The circuit court gets it by the fact that you have created them and the Constitution confers it.

Mr. HERSEY. It gets it from Congress.

Mr. THOM. It gets it from the Constitution.

Mr. CHANDLER. It says it shall extend to all cases in law and equity. The injunction is an essential equitable remedy.

Mr. THOM. It gets it from the Constitution. You—Congress—create the courts and the jurisdiction comes pursuant to the mandate of the Constitution.

Mr. CHANDLER. We have defined the powers in equity matters arbitrarily by legislation, have we not?

Mr. THOM. Not in their essential qualities. Now the question arises whether Congress can take away from the Federal judiciary power to issue injunctions. Injunction is an essential part of the judicial power and that I am about to discuss. It becomes, therefore, important to inquire whether the power to grant injunctions in the cases mentioned in this bill is an essential part of the judicial power now possessed by the courts.

It will be remembered, in this connection, that the authoritative definition of judicial power is "the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision." The power to decide and to pronounce judgment amounts to nothing without the complementary power to enforce that judgment. (Central National Bank *v.* Stevens, 169 U. S. 432, 465.)

The fourteenth amendment of the Federal Constitution provides that—

"No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Section 8 of Article I of the Constitution confers upon Congress exclusive power—

"To regulate commerce with foreign nations, and among the several States, and with Indian tribes,"

thus withholding this power from the States.

The method now authorized by law and employed by the Federal courts to protect the rights of citizens thus guaranteed by the Constitution is in almost all cases by injunction. In nearly all cases it is the only remedy possible.

If a statute should be passed by a State prohibiting children of working people from leaving that State and seeking homes and shelter in another State, that statute would violate both the fourteenth amendment and the commerce clause, not only as to the children and their parents but also as to the railroads to whom they were offered for carriage. In case of an organized and systematic effort on the part of the officers of

the State to enforce such a statute, the only remedy to prevent the violation of these constitutional rights would be an injunction. No other adequate remedy is conceivable. If the courts could not intervene by injunction, the most substantial and valuable rights of persons and of citizens of the United States would be violated and the courts would be deprived of an essential part of their judicial competency and power.

If a statute should be passed by a State authorizing a railroad company to take a man's home without compensation and without any proceeding in court, that statute would be a violation of the fourteenth amendment, and its enforcement against the person would be prevented by injunction. Injunction would be the only remedy open to the man whose rights were thus invaded. To relegate him to an action for damages for the unconstitutional taking would be to trifle with and mock him. It would be to give him a lawsuit instead of a home. If he can not have some way of keeping his home to which he is constitutionally entitled and of preserving uninvaded the rights guaranteed to him by the Constitution, government as to him will have broken down at its most vital point and the judicial power will as to him have utterly failed. He would have no adequate remedy and the courts would have no adequate power.

If the case is turned around, and individuals are by State statute, or by any State authority, given the right to confiscate the property of a railroad, the result, as a matter of constitutional right and of governmental and judicial competency, would not be different. Measures, however innocently intended, but having the effect of confiscation, usually in respect to railroads, take the form of a prescription, either by statute or by a commission, of rates of compensation for transportation services so low as to be confiscatory and therefore unconstitutional.

To make this case entirely plain, let us suppose the extreme case of a statute, or order of a commission, requiring a railroad company to perform all of its services without any compensation whatever. Such a requirement would be universally admitted to be an unconstitutional invasion of constitutional rights—no more, certainly, unconstitutional, it is true, than a schedule of rates too low to afford an adequate return. Inasmuch, however, as taking away all return would present the case in indisputable form, it will serve more pointedly to illustrate the underlying truth. In such a case, the only means equity would have of dealing with the situation and of protecting the constitutional rights of the complainant would be by injunction; the only way law would have would be by an action by the carrier against each individual patron to recover the amount of its constitutional charges. The remedy at law, therefore, would be a mere mockery. If there were no remedy except these actions at law, Government and the courts would, in this case as in the others, break down at their most vital points. The effect of the statute, or of the commission's order, although a direct invasion of constitutional rights, would, unless equity can intervene with its preventive power, be to take away the carrier's property and to give it instead innumerable lawsuits. Such a remedy would not be adequate and would be no protection for constitutional rights of property.

This aspect of the case has been carefully examined and has been finally determined and settled by the highest court. Mr. Justice Miller, in the case of Chicago, Milwaukee & St. Paul *v.* Minnesota (134 U. S. 460), says that—

"The proper, if not the only, mode of judicial relief against the tariff of rates established by the legislature or by its commission is by a bill in chancery asserting its unreasonable character."

And that until the decree of the court in such equity suit was obtained, it was not competent for each individual having dealings with the carrier, or for the carrier in regard to each individual who demands its services, to raise a contest in the courts over the questions which ought to be settled in this general and conclusive manner.

The only power a court of chancery would have to deal with the question would be by injunction. The same view was reiterated in ex parte Young (209 U. S. 166).

In fact, it is universally held and is universally true that injunction is the only practicable and adequate remedy. It is never issued if there is any other adequate remedy. Throughout the history of jurisprudence it is known as "the right arm of equity." It is defined as—

"A writ framed according to the circumstances of the case, commanding an act which the court regards essential to justice, or restraining an act which it deems contrary to equity and good conscience." (Jeremy's Equity, 307.)

"The antiquity of this writ is no less than that of equity as a distinctive branch of administrative justice. Indeed, it may be regarded in the light of a virtual rescript of the prætorian interdict of the Roman civil law." (Spelling, p. 2, sec. 2.)

"Without the power to prevent, as well as to undo wrongs, to restrain as well as to compel action, to preserve as well as to reinstate the status of persons and things,

courts of equity would possess but little power and command but little respect as dispensers and arbiters between man and man. The important restraining function is given effect by the great extraordinary remedy of injunction which may be appropriately termed 'the strong arm of courts of equity.'" (Spelling, sec. 3.)

The judicial power of the United States is made by the express terms of the Constitution to extend to all cases of equity as well as to all cases of law arising under the Constitution and laws of the United States. To take away from courts of equity their power to command—whether that command be to do the thing which justice and law and the rights of the parties require, or to desist from an act which would be destructive of justice and law and right—would be to deprive equity of its most essential and distinctive power.

To destroy the efficiency of the equity power, even though its name be left, would be to destroy a substantial and essential subdivision of the judicial power and one of the subdivisions into which the power is divided by the Constitution itself. It will thus be seen that to take away from the Federal courts their whole power of preventive justice, by depriving them of the power to order that the constitutional rights of a person shall not be invaded, is to take away from the courts an essential part of their judicial competency. This, as has been shown, can not be done.

Now, as to interlocutory injunctions, it is necessary to bear in mind the difference between reasonable regulations as to notice, practice, and procedure, on the one hand, and acts substantially destructive of judicial competency on the other.

All that has been said in regard to injunctions generally applies not only to final but to interlocutory injunctions as well. The necessity for a judicial power to grant interlocutory injunctions is no less real than the necessity to grant final injunctions. The theory of an injunction is to prevent an invasion of a right for which there is no adequate remedy, if the invasion is permitted. The judicial branch of the Government, if deprived of this power of protection, is deprived of a substantial and an essential part of its judicial competency. Yet this bill would have that effect as to the cases it covers.

Take again the case of a State statute, or of an order of its commission, requiring a carrier to perform all of its transportation services without any compensation. Suppose that the courts have no power to prevent the States from putting that statute or order into execution pending a final determination of the case. Can there be any doubt that a situation would thus be created out of which might, and probably would grow during the period of litigation absolute bankruptcy and destruction? To deny to the courts the power of protection from such a situation as this would be to deny to them judicial efficiency and competency, and yet the proposed bill would, if constitutional, have this effect. The fact that no State statute, or order, is likely to go to this extreme, but would probably be confined to fixing some rate of compensation, although that rate might be so low as to be confiscatory, does not change the principle. If the courts have no power to prevent the enforcement of a confiscatory State statute, or confiscatory State order, during the litigation, then for that period, long or short, there would be no power to prevent confiscation. The constitutional right is that rights of property shall not be invaded at all. It is no preservation of this right to say that the courts can prevent confiscation after it has existed for the two or three years involved in litigation.

But, irrespective of the proposition that these acts would be unconstitutional because they involve an unconstitutional impairment by the legislature of the judicial branch of the Government, they would be unconstitutional, because, however intended, they would in effect be a part of an effective scheme of confiscation.

The fourteenth amendment provides that a State shall not deprive a person of his property without due process of law. This is a prohibition against confiscation.

The fifth amendment contains a corresponding prohibition on the United States.

It is clear, therefore, that no law can be passed by Congress as a part of a scheme of confiscation, or which, however intended, will have the effect of accomplishing confiscation. An act of Congress, or an order of a Federal commission, fixing confiscatory rates and providing that the courts shall have no power to prevent its enforcement, would, independently of every other consideration, be unconstitutional, because to abolish all preventive remedy against the enforcement of a confiscatory measure would be the means of violating the fifth amendment, and all parts of this scheme, or method, of confiscation would be unconstitutional and void.

If, on the other hand, a State were to pass a statute, or a State commission were to make an order, fixing confiscatory rates, and Congress were to make the success of that scheme of confiscation possible by depriving Federal courts of the power to prevent its consummation, it would be confiscation accomplished through a cooperation between Federal and State Governments, and those who would uphold the constitu-

tionality of such a proceeding would, in respect to a system of jurisprudence which looks to the substance and not the form, have to establish the proposition that, although the Constitution prohibits Congress and also prohibits the State from taking a person's property without due process of law, it does not prohibit the same result from being accomplished by the joint action of the two; in other words, that when it prohibits each it does not prohibit both.

The great constitutional purpose was to protect persons from confiscation by action of any legislative or other authority. It laid its prohibition on the Federal and also on the State legislature. This great constitutional purpose can not be destroyed by the cooperation of the two.

The withdrawal of a power from the Federal courts to prevent the invasion of rights guaranteed by the Federal Constitution can not, intentionally or unintentionally, be made a part of a scheme or of a method of confiscation.

There are two separate grounds, therefore, each of which is sufficient and conclusive by itself for declaring unconstitutional any act of Congress which will take away from the courts of the United States their existing power to grant injunctions.

First, because Congress can not constitutionally destroy or emasculate the Federal judiciary, which is a separate, coordinate, and essential department of the constitutional scheme of Federal government; and, second, because to do so, as proposed by these bills, would have the effect of rendering successful any scheme of State confiscation that might be devised and would therefore constitute a part of a proceeding which would deprive citizens of constitutional rights guaranteed against invasion by the State by the fourteenth amendment to the Federal Constitution.

Nor is it any answer to say that it is not proposed to take away the protection of these constitutional rights, but to leave their protection to the tribunals of the State. Congress can not constitutionally take away from the Federal judiciary the power of protecting rights arising under the Constitution of the United States, and thus leave such protection to the courts of the State.

By reference to the terms of the fourteenth amendment it will be seen that the prohibitions of that amendment are on the State itself and apply to all of the agencies through which a State may act, including the State courts. In fact, it has been expressly decided by the Supreme Court that—

"The prohibitions of this fourteenth amendment refer to all the instrumentalities of the State; to its legislative, executive, and judicial authorities; and therefore whoever by virtue of public position under a State government deprives another of any right protected by that amendment against deprivation by the State, violates the constitutional inhibition." (C., B. & Q. R. R. *v.* Chicago, 166 U. S. 226.)

As State courts are thus included amongst the agencies of the State which may be the instrumentalities through which the constitutional inhibition may be violated, it would be strange, indeed, if the constitutional rights of the citizens of the United States should be left to the sole protection of one of the very authorities against which protection is needed. The fact that the decisions of the State courts may be carried to the Supreme Court of the United States for review does not save the situation, for when a case is carried there from the highest court of a State, it must be by writ of error, and under this writ the judicial power of relief in respect to constitutional rights would be essentially impaired, because, on a writ of error, the Supreme Court could only review questions of law and not questions of fact, whereas constitutional rights frequently depend entirely upon the determination of questions of fact.

In the language of the Supreme Court:

"If the railroads were required to take no active steps until they could bring a writ of error from this court to the supreme court of appeals after a final judgment, they would come here with the facts already found against them. But the determination as to their rights turns almost wholly upon the facts to be found. Whether their property was taken unconstitutionally depends upon the valuation of the property, the income to be derived from the proposed rate, and the proportion between the two—pure matters of fact. When those are settled the law is tolerably plain. All their constitutional rights, we repeat, depend upon what the facts are found to be." (Prentis *v.* Atlantic Coast Line, 211 U. S. 228.)

But, irrespective of this, it was never intended in our constitutional system that the Federal Government should look beyond its own governmental agencies for the power to execute its laws, to provide for its self-preservation in full and complete governmental competency, or to secure to its citizens their constitutional immunities and rights.

In Cohens *v.* Virginia (6 Wheat. 387) the Supreme Court, speaking through Chief Justice Marshall, said:

"No government ought to be so defective in its organization as not to contain within itself the means of securing the execution of its own laws against other dangers than

those which occur every day. Courts of justice are the means most usually employed and it is reasonable to expect that a government should repose on its own courts rather than on others. There is certainly nothing in the circumstances under which our Constitution was formed—nothing in the history of the times—which would justify the opinion that the confidence reposed in the States was so implicit as to leave in them and their tribunals the power of resisting or defeating, in the form of law, the legitimate measures of the Union."

The Supreme Court was here discussing the constitutional status of the Federal courts in respect to the State courts, and held that the Constitution contemplated a power in the Federal judiciary itself to enforce the Constitution and laws of the United States.

In leading up to this conclusion the Chief Justice, speaking for the court, said, among other things, beginning at page 385——

Mr. CHANDLER. Have you been reading from the opinion or your argument?

Mr. THOM. From Chief Justice Marshall. Delighted that you can not tell the difference.

Mr. CHANDLER. Indicating a lack of familiarity on my part with the Chief Justice.

Mr. THOM. Chief Justice Marshall said:

"The mischievous consequences of the construction contended for on the part of Virginia (namely, that the action of the courts of a State in denying or in upholding rights claimed under the Federal Constitution is final and conclusive) are also entitled to great consideration. It would prostrate, it has been said, the Government and its laws at the feet of every State in the Union. And would not this be its effect? What power of the Government could be executed, by its own means, in any State disposed to resist its execution by a course of legislation?

"It would be hazarding too much to assert that the judicatures of the States will be exempt from the prejudices by which the legislatures and people are influenced, and will constitute perfectly impartial tribunals. In many States the judges are dependent for office and for salary on the will of the legislature. The Constitution of the United States furnishes no security against the universal adoption of this principle. When we observe the importance which the Constitution attaches to the independence of judges we are the less inclined to suppose that it can have intended to leave these constitutional questions to tribunals where this independence may not exist.

"In fact, in this aspect of the subject, as well as in every other, the supreme necessity for a competent and fully organized judicial department is apparent and is controlling. Such a department is a necessary condition of our continued national life as it now exists under the Constitution. Congress can not leave to the courts of a State the duty and obligation of protecting constitutional rights, not only because to do so would, in many cases, be making the national legislation a part of a scheme or of a method of confiscation, but also because it would be an act destructive of one of the essential branches of the Federal Government and, therefore, an act destructive of the Constitution itself.

"It must never be forgotten that the Constitution contains no power in any of its departments for its own destruction. Every power granted by the people in that instrument looks to measures designed to establish its permanency and to extend to all the generations of the future the blessings of a well-balanced, a well-ordered, and a fully equipped governmental system, containing within itself the powers necessary to guarantee the enjoyment of those immunities and rights considered fundamental among a free people.

"THE QUESTION CONSIDERED INDEPENDENTLY OF A CONSTITUTIONAL INABILITY ON THE PART OF CONGRESS TO ESSENTIALLY IMPAIR THE JUDICIAL DEPARTMENT.

"A larger view of this question may, however, properly be presented.

"It can not be denied that the temper of the times is largely one of resentment at any obstacle in the way of the immediate enforcement of the popular will. If the laws of a State are deemed an impediment or afford in popular judgment an ineffective means of immediately gratifying the popular wish, the tendency is to put the State aside and to look to the Federal power. If the Constitution or laws of the United States oppose an obstacle to the immediate gratification of the will of the majority, the tendency is to remove that obstacle and to resort to the powers of the State. The guiding principle is no longer a proper jealousy of the just division of powers between the National and State governments. The controlling consideration is how quickly and most certainly the majority may accomplish its temporary and immediate purposes. The popular attitude is largely one of impatience with any law and all laws which impose a restarint and provide a waiting time for investigation, for considera-

tion, and for calm judgment. Many people have come to 'want what they want when they want it,' and to adopt a political philosophy which demands a government without restraint, and is not afraid to run down hill without a bridle and without a brake.

"It was for just such conditions as these that governments were instituted among men. In the American States, and in the United States, written constitutions, slow and difficult of amendment, were provided for the protection of the rights of life, liberty, and property against the capricious action of the multitude. The safety of society depends upon the jealousy with which the restraints, the checks, and balances, of these constitutions are preserved. It will not always be easy to preserve them. Situations will arise in all periods of public impatience and excitement, as have arisen now, when an appeal by an unpopular person or an unpopular interest to the Constitution or the courts, will, in some quarters, be construed as a defiance of the popular will and an unwarranted refusal to accept as final a popular verdict. And yet the constitutional rights sought to be enforced may be clear and may be fundamental. The majority can get their rights without the aid of government. The powerful and the popular need no defender, but what of the person who has been unfortunate enough to incur, rightly or wrongly, the disfavor of the public and to arouse against himself or his interests popular antagonism? If government is incapable of protecting him in his just rights, it fails in its most important function. The supreme need for government and the supreme triumph of law is the protection of those who would be defenseless without it.

"This means, in a very fundamental sense, that there must, in the interest of society, be lawful restraint on the capricious or passionate exercise of power by the majority. If this is to be a Government of a thoughtful and deliberate people, and if popular government is to endure and to serve a beneficent purpose among men, then the majority must impose and must recognize restraints upon its own power. It can not without destructive consequences exist among conditions where the popular caprice and passion can pass into effective action without a check. The principle of proper restraint on passion and inclination comes down to us consecrated by the reverent acceptance of the ages. It is as old as the law giving on Mount Sinai, when Jehovah said to His people, 'Thou shalt not'; as old as Magna Charta, when the people said to the King, 'Thou shalt not'; as old as the conception of liberty, justice, and stability in popular government, when in their fundamental law the people said to the majority, 'Thou shalt not.'

"The necessity for a just and enduring system of restraints on excessive and capricious use of power is thus fundamental in all government. The only means yet devised by which the people may impose these restraints on themselves are the courts. They were created to measure out justice to the weak and defenseless, as well as to the strong and mighty, with an even, honest, and unterrified hand. There are no other peaceful means to protect the weak against the encroachments of the strong.

"It is therefore submitted that, even if Congress were hindered by no constitutional limitation, it would still be unwise in the extreme and would still disappoint the fundamental purposes of all well-regulated and just government, to take away from the courts their power of preventive justice, and to lay prostrate at the feet of the mob the constitutional rights of men. If there is to be no restraint, life and liberty will in the end be as defenseless as property. The necessity for life to be sacred, for liberty to be secure, and for property to be safe and protected from both the individual despoiler and from confiscation under the forms of law is supreme.

"We are at a crucial period in our history. The supreme test is, by such propositions as the proposition of this bill and similar ones, being applied to our popular and democratic institutions. The question which is to be answered is whether in a democracy, where in the last resort the power of the people is absolute and supreme over all law and all constitutions, the majority will permanently permit itself to remain under just limitations of their power and submit to just and necessary constitutional restraints? When a serious effort is thus made to weaken these self-imposed restraints, the thoughful student of history can not fail to revert to the prophecy of Macaulay, made in 1857, in a letter to an American friend, in regard to American institutions, where he said:

"'I have long been convinced that institutions purely democratic must sooner or later destroy liberty or civilization, or both. In Europe where the population is dense the effect of such institutions would be almost instantaneous. What happened lately in France is an example. In 1848 a pure democracy was established there. During a short time there was reason to expect a general spoliation, a national bankruptcy, a new partition of the soil, a maximum of prices, a ruinous load of taxation laid on the rich for the purpose of supporting the poor in idleness. Such system would

in 20 years have made France as poor and barbarous as the France of the Carlovingians. Happily, the danger was averted; and now there is a despotism, a silent tribune, an enslaved press. Liberty is gone, but civilization has been saved. I have not the smallest doubt that if we had a purely democratic government here the effect would be the same.

"'Either the poor would plunder the rich, and civilization would perish, or order and prosperity would be saved by a strong military government, and liberty would perish. You may think that your country enjoys an exemption from these evils. I will frankly own to you that I am of a very different opinion. Your fate, I believe to be certain, though it is deferred by a physical cause. As long as you have a boundless extent of fertile and unoccupied land, your laboring population will be far more at ease than the laboring population of the Old World, and, while that is the case, the Jefferson politics may continue to exist without causing any fatal calamity. But the time will come when New England will be as thickly peopled as old England. Wages will be as low, and will fluctuate as much with you as with us. You will have your Manchesters and Birminghams, and in these Manchesters and Birminghams hundreds of thousands of artisans will assuredly be sometimes out of work. Then your institutions will be fairly brought to the test. Distress everywhere makes the laborer mutinous and discontented, and inclines him to listen with eagerness to agitators who tell him that is is a monstrous iniquity that one man should have a million while another can not get a full meal.

"'It is quite plain that your Government will never be able to restrain a distressed and discontented majority. For with you the majority is the government, and has the rich, who are always a minority, absolutely at its mercy. The day will come when in the State of New York a multitude of people, none of whom has had more than half a breakfast, or expects to have more than half a dinner, will choose a legislature. Is it possible to doubt what sort of a legislature will be chosen? On one side is a statesman preaching patience, respect for vested rights, strict observance of public faith.

"'On the other is a demagogue ranting about the tyranny of capitalists and usurers, and asking why anybody should be permitted to drink champagne and to ride in a carriage, while thousands of honest folks are in want of necessaries. Which of the two candidates is likely to be preferred by a workingman who hears his children cry for more bread? I seriously apprehend that you will, in such a season of adversity as I have described, do things which will prevent prosperity from returning; that you will act like a people who should in a year of scarcity devour all the seed corn, and thus make the next a year not of scarcity, but of absolute famine. There will be, I fear, spoliation. There is nothing to stop you. Your Constitution is all sail and no anchor. As I said before, when a society has entered on its downward progress, either civilization or liberty must perish. Either some Caesar or Napoleon will seize the reins of government with a strong hand, or your Republic will be as fearfully plundered and laid waste by barbarians in the twentieth century as the Roman Empire was in the fifth; with this difference, that the Huns and Vandals who ravaged the Roman Empire came from without, and that your Huns and Vandals will have been engendered within your own country by your own institutions.'"

Mr. VOLSTEAD. May I ask a question?

Mr. THOM. I am not quite through, Mr. Volstead. No one, no thoughtful American, will echo the evil prophecy there suggested by Macaulay.

Mr. CHANDLER. We would rather have the definition and opinion of Gladstone, would we not?

Mr. THOM. Yes, sir. But this is true: We have much sail, but still we have anchor, and the question before the American people is this: Shall we go on extending the sail and shall we go on weakening the anchor? It is a question of the highest import, and when the proposition is to take one of the coordinate branches of the Government and to impair it in its essential completeness and power by the action of another, you have gone far in destroying the anchor which should hold us in the port of safety.

Mr. VOLSTEAD. Let me suggest this to you: The fourteenth amendment provides that you shall not take life, liberty, or property without due process of law. That is the provision under which most of these suits are brought. Let us assume that the State furnishes due process of law. What right has the Federal Government to come in and interfere? That, it seems to me, is the question here. Now, in many instances, under this provision of the Constitution, one of the parties is a nonresident, and, of course, the suit can then be brought because of such nonresidence. But this proposition is to stop the Federal courts from interfering on that ground. Is not that about it. In the Frank case, decided a few years ago, I think the court clearly indicated that where the State was furnishing due process, the Federal Government should not interfere. Under this bill we are taking away the right to appear in a Federal court, because there is a diversity of citizenship.

Mr. THOM. No. The language of the Constitution is that the judicial power shall extend to all cases in law and equity arising under this Constitution.

Mr. VOLSTEAD. That is true, but the fourteenth amendment does not give the Federal Government a power to interfere unless the State denies due process of law. That is the power under which I assume you have got to act in these cases.

Mr. THOM. I do not think so.

Mr. VOLSTEAD. I think so because this is a State statute, a State proceeding, that you are seeking to enjoin. If the State does not furnish due process of law, that gives as I view it about the only ground upon which you may go into a Federal court, if there is no diversity of citizenship.

Mr. THOM. Who shall determine whether it deprives a person of life, liberty, or property.

Mr. VOLSTEAD. That is a different problem.

Mr. THOM. That is the question here. The Constitution says the State shall not deprive a person, etc.

Mr. VOLSTEAD. That is an entirely different thing.

Mr. THOM. The Federal court. Here is a case arising under the Constitution of the United States.

Mr. VOLSTEAD. Yes; but it comes under the fourteenth amendment.

Mr. THOM. It arises under the Constitution of the United States.

Mr. VOLSTEAD. True the fourteenth amendment is a part of the Constitution of the United States, but the fourteenth amendment is directed against the State; it is not directed against the Federal Government. It says the State shall not deprive anybody of life, liberty, or property without due process of law.

Mr. THOM. Suppose the State attempts to do it?

Mr. VOLSTEAD. With due process.

Mr. THOM. Suppose the State attempts to do it.

Mr. VOLSTEAD. What right have you?

Mr. THOM. You have a right to prevent it under this provision of the Constitution, which says that the judicial power shall extend to all cases in law and equity arising under this Constitution.

Mr. VOLSTEAD. You are getting it on the ground that there is diversity of citizenship or that the right is taken without due process of law.

Mr. THOM. No.

Mr. VOLSTEAD. Sure you are.

Mr. THOM. Two people that are citizens of the same State may go into the Federal court if there is a constitutional question involved.

Mr. VOLSTEAD. Not if it is simply a question of the deprivation of a person's life, liberty, or property. There must be a deprivation without due process of law.

Mr. THOM. Yes. The proposition I stated is old and well established, so that there can not, I think, be any further question about it.

Mr. VOLSTEAD. I would like to see how.

Mr. THOM. If a State attempts to deprive a person of life, liberty, or property without due process of law, and there is no diversity of citizenship, that question as an initial question arises under the Constitution of the United States, and the United States courts have jurisdiction of it *ab initio*.

Mr. VOLSTEAD. But my impression is that if the State furnishes due process, the Federal Government should not interfere, but if a State arbitrarily takes a man's property, the Federal Government should protect him.

Mr. THOM. But, Mr. Volstead——

Mr. VOLSTEAD (interposing). Then the Federal court has jurisdiction, but if the State does furnish due process, my impression is you can not get into the court.

Mr. THOM. But the very basis of the complaint is that they do not furnish due process. Who determines the question?

Mr. VOLSTEAD. If the State has got a court and that court has the power to issue injunction, and has the power to protect just the same as the Federal Government, why is it not furnishing due process? You can not say that because it decided a fact different from what the Federal court might decide that, therefore, it does not furnish due process.

Mr. THOM. May I be permitted to ask you a question?

Mr. VOLSTEAD. Yes.

Mr. THOM. Suppose that a complainant comes into the Federal court alleging that certain action of the State is not due process of law. Can the State court decide that it is and thereby deprive the Federal court of jurisdiction?

Mr. VOLSTEAD. No; but when it is in fact due process, the Federal court will say that it is due process.

Mr. FOSTER. Can a State deny that if it is tried in a Federal court? That is one question.

Mr. THOM. There is a question. Can you deprive the litigant of the right to have question determined by the Federal court?

Mr. VOLSTEAD. But you would not try the fact as to whether it was deprivation of property. You would only try the question of whether the State was furnishing due process. That fact being established the suit would be dismissed without a trial.

Mr. THOM. You could try the question of deprivation of property in the Federal court ab initio, and no judicial system would be complete without that. You can not have a complete Federal judicial system if rights under the Constitution are to be enforced only by the State.

Mr. VOLSTEAD. I think the Supreme Court has repeatedly held that Congress can give to or withhold from the inferior Federal courts any part of the Federal jurisdiction.

Mr. THOM. My whole investigation of the Supreme Court decisions has failed to disclose even one such case.

Mr. VOLSTEAD. I am sure there are a number of such cases.

Mr. THOM. I would like very much to have the reference.

Mr. VOLSTEAD. I would like to have several references showing that that is not true.

Mr. THOM. I have given you mine.

Mr. FOSTER. Chairman Volstead missed the early part of your argument, not that he would be convinced by it.

Mr. THOM. I will only detain you for one word more. I have laid my views before the committee and can not undertake to restate them. I think that the court in the case of Ex parte Siebold (100 U. S. p. 393) has said some things pertinent to this controversy between the States and the Federal Government, which, if observed, would do away with all this jealousy and all this feeling of unrest, which has been the genesis of this bill. The court said:

"The greatest difficulty in coming to a just conclusion arises from mistaken notions with regard to the relations which subsist between the States and the National Government. It seems to be often overlooked that a National Constitution has been adopted in this country establishing a real Government therein operating upon persons and operating upon things, and which, moreover, is or should be as dear to every American citizen as his State government is. Whenever the true conception of the nature of this Government is once conceded, no real difficulty will arise in the just interpretation of its powers, but if we allow ourselves to regard this as a hostile organization opposed to the proper sovereignty or dignity of the State governments, we shall continue to be vexed with questions of jurisdiction of authorities. No greater jealousy is required to be exercised toward this Government in reference to the preservation of our liberties than is proper to be exercised toward the State government."

The courts of the United States are in very real and fundamental sense the courts of the people of the States. It is not a foreign tribunal. It is a tribunal created by the people themselves. It is a tribunal which the people themselves own and control. They do it by different means. They do it by national action instead of State action, but it is their court; it is not foreign to them. It is their court and ought to be trusted by them as much as their State courts. If it can not be trusted by them it ought to be reformed; it ought not to be abolished, but it is theirs to reform, to continue, to perfect, just as the courts of the State are the State's to reform, to protect, and to create.

Mr. CHANDLER. I want to say that I can give the substance of your address in a sentence, or a paragraph, at least, that when the Constitution says, "may create inferior courts," it means that it must do it.

Mr. THOM. Yes, sir.

Mr. CHANDLER. That having created these courts, the right to destroy does not follow, but you negative the idea of the right under the Constitution to destroy those things that are once brought into existence. They are a necessary part of Government and may be modified or other courts substituted for them with equal jurisdiction, but under the Constitution you can not destroy the court.

Mr. THOM. You can not destroy the judicial power.

Mr. CHANDLER. The judicial power extends in law and equity to those courts in matters coming before them under proper jurisdiction. Further, that the writ of injunction is an extraordinary equitable remedy, and that to destroy that writ of injunction is to destroy the court, which you claim can not be constitutionally done.

Mr. THOM. Yes; it would be an impairing of the judicial power.

Mr. CHANDLER. That is your contention under the first heading. Second, that there should be Federal machinery complete within itself, and that, you state, should not be turned over, to destroy the Federal law?

Mr. THOM. That can not be constitutionally done.

Mr. CHANDLER. That can not be constitutionally done. Those are the two ideas of your address.

Mr. THOM. Yes. You say, can not destroy the court. I would make the statement this way, can not destroy an essential part of the judicial power as defined by the Constitution, and that power, it seems to me, is deposited in the Federal judiciary.

Mr. CHANDLER. Mr. O'Brien, the very able corporation counsel of New York, has submitted a memorandum here, in which citations are given showing that certain classes of cases may be withdrawn. Can you withdraw a certain class of cases without involving the idea of destruction of rights?

Mr. THOM. It depends on whether what is attempted to be withdrawn is an essential part of the judicial power. Of course, if the writ of injunction is not an essential part of the judicial power, you can withdraw it. If it is an essential part you can not withdraw it. The whole question in any case where there is a limitation put on the Federal courts is whether it amounts to withdrawal of an essential part of the judicial power.

Mr. CHANDLER. Certain cases are tried in certain courts and certain cases not. If the jurisdiction of a certain class of cases is left in the Federal court, I agree you can not destroy the right of injunction, especially when the Constitution confers jurisdiction in equity cases in that court, but the question is that you will not be permitted to try this class of cases at all under the general power to create jurisdiction for courts or to modify that jurisdiction when you see fit.

Mr. THOM. I do not think so. I think under the Constitution it was the duty of the Congress to distribute the whole judicial power among the several Federal courts. Having once done that they can not withdraw a substantial part of it without violating the Constitution, because they would thereby be impairing part of what is essential to the completeness of the judicial power. The whole question in any case, which is presented, is whether what is proposed constitutes a withdrawal of an essential judicial power from the Federal courts according as Congress may establish them. It is a question of placing somewhere in some Federal tribunal the entire judicial power, and, having done that, you can never withdraw an essential part of it without impairing the judicial department of the Government, because you take away from it an essential part of the judicial power conferred by the Constitution upon the Federal judiciary.

Mr. HERSEY. This bill does not withdraw that power of injunction from Federal courts. It only does it in regard to a certain particular class of cases, to wit, utility cases of the State.

Mr. THOM. Yes.

Mr. HERSEY. The bill does not intend to limit the jurisdiction in matters of interstate commerce, in so far as it affects interstate commerce. It says "that nothing herein contained shall limit or affect in any manner the jurisdiction of district and circuit courts of the United States and judges thereof in matters affecting interstat commerce."

Mr. THOM. The question is whether that amounts to a withdrawal from the Federal courts of a substantial and essential part of the judicial power. That is the question for you to weigh and determine. My argument is that the injunction, both interlocutory and final, is an essentail part of the judicial power, and you can not withdraw it in any class of cases without impairing the completeness of one of the departments of this Government.

Mr. GRAHAM. You can not withdraw it without placing it somewhere else as part of the judicial system.

Mr. THOM. Always with that limitation, that you must when you withdraw it from one put it somewhere else.

Mr. GRAHAM. But you can abolish the court, change a court, you can change the jurisdiction of the courts, so long as you maintain the completeness and the lodgment of the whole judicial system.

Mr. THOM. The whole judicial power in some arrangement of the Federal judiciary of course.

Mr. HERSEY. On another point, not a legal position exactly, although incidental, the proponents of this bill claimed in the prior hearings before this committee that one of the most essential demands for this bill came because of going into the Federal court for injunction, which delayed the settlement of rate questions and such things as that before utilities commission, which would be hastened by the Supreme Court of the State and through the different courts of the State, but that it only furnishes delays in the Federal courts by going to the Federal courts in the first instance.

Mr. THOM. I thought that contention was so adequately answered by the gentleman to whom I had the pleasure of listening at the last session, where it was shown that greater delays would be caused by——

Mr. CHANDLER (interposing). Judge Ransom.

Mr. THOM. Yes, sir. I thought that was completely answered by him.

Mr. CHANDLER. If this legislation was passed it would not prevent officials going to the Federal courts, but as far as delays or expense are concerned it has the effect that you can avoid delay and curtail expense by having two jurisdictions instead of one.

Mr. THOM. I agree with Judge Ransom in respect to that, but I will say this, if your system of the judiciary is such that there is too much delay you ought to reform your judiciary so as to have such speed as the interests of the public require. You can not deal with this question by taking away part of its judicial power.

Mr. GRAHAM. Mr. Ettelson, corporation counsel of Chicago, is here in place of the mayor of Chicago.

STATEMENT OF MR. SAMUEL A. ETTELSON, CORPORATION COUNSEL OF THE CITY OF CHICAGO, ILL.

Mr. ETTELSON. Mr. Chairman and members of the subcommittee, at the outset I want to thank you gentlemen for permitting me to make this address to the committee, after hearing so many elaborate arguments for and against this Bacharach bill, and to say that Mayor Thompson, of Chicago, is unable to be here on account of the press of official business and asked me to come and represent him and the city of Chicago.

A great English statesman, Lord Melbourne, said that "the whole purpose of government is to prevent crime and to preserve contracts." I appear here on behalf of the city of Chicago to ask you gentlemen to enact the Bacharach bill into law because first, it will prevent a crime in the city of Chicago—the continued perpetration of a crime by the traction companies of that city against the people of Chicago—and, second, it will help to preserve the contracts that have existed between the people of Chicago and the traction companies or, at least, help to require the traction companies to live up to their contracts with the people of our city.

When I say a crime was perpetrated by the traction companies of Chicago, I speak advisedly because under those contracts the traction companies of Chicago were required to charge the people a nickel car fare and give the people adequate service, and they have violated those contracts with the people in the two vital provisions in which the people of Chicago are interested, because they have refused to give the people adequate service and give them, I dare say, the most atrocious service given by any traction companies to the people of any large municipality in the entire United States of America, and they are charging our people eight cents car fare, a three-cent excess fare over the provisions of the contract they made with the people, and the three-cent excess car fare means that they are taking out of the pockets of the people of the city of Chicago some $60,000 a day or more than $21,000,000 a year. Those contracts were passed in 1907, were made between the traction companies and the city council of the city of Chicago, approved on referendum vote of the people, and have yet five years to run. They terminate in 1927.

The constitution of the State of Illinois provides that no street railroad company shall operate in any municipality without the consent of the municipal authorities. The street car companies in the city of Chicago, gentlemen, under that provision of the constitution of the State of Illinois, can not lay one foot of car tracks in the streets of the city without the consent of the City Council of Chicago, representing our people.

Those contracts provided among other things that there should be taken out of the gross receipts that came to the traction companies under these grants enough money to pay the operating expenses of the street car companies, and in addition a 5 per cent return on the capital account, or the investment that the traction companies made up under those ordinances—5 per cent of the capital account in each year, provided the gross receipts brought in enough to pay the traction companies that 5 per cent return—but the contracts further provided that if in any year there is not sufficient to pay the companies 5 per cent return that the deficit should be made up in some subsequent year or subsequent years under the terms of the contracts. The contracts further provided that of the net receipts the city of Chicago should receive 55 per cent and the traction companies 45 per cent. The contracts with the street car companies also provided for universal transfers within the city of Chicago.

Now, under the provisions of those ordinances the street car companies were allowed a capital account at the inception of these proceedings, and, in other words, by virtue of the terms of these contracts a capital account of $55,000,000, and under the terms

of those ordinances that capital account has been built up from $55,000,000 to over $160,000,000. That is the claim that the traction companies make in regard to their capital account at the present time. But when the counsel for the traction companies a few years ago appeared before the board of review, he stated to the board of review, which is our county taxing authority, that of the capital account of the traction company as it then existed there was from "$85,000,000 to $90,000,000 that represented no property at all." In other words, it was junk, and is what we sometimes denominate "water."

You hear so much concern expressed about the rights of the traction companies. These companies in the city of Chicago, that could not have made a dollar except through the action of the people in making this grant to them, have made under these ordinances up to the present time $100,000,000 and more profit. Now, we say, gentlemen, that we want those traction companies to live up to their contracts with the people of the city which enabled them to make more than $100,000,000, and give the people the nickel car fare, give them the adequate service that they promised our people when they voted in 1907 in favor of this 20 years' grant.

We are asking you gentlemen to confine the activities of the traction companies in their litigation with the city in the first instance to the State courts, which are perfectly competent to pass upon the questions that arise in this litigation and not permit them to rush into the Federal courts and tie up first the nickel car fare, and second, 6-cent car fare, as was subsequently established by the State commerce commission of our State, by going in and having an ex parte hearing on a bill of complaint where the people have not had a chance to be heard because the injunction was issued without notice; and, mind you, on account of the fact that the litigation is still pending in the Federal courts in our district, I want no word of mine to be construed as a word of criticism of any Federal judge, for obvious reasons. I am directing my remarks to the system that prevails which makes it possible for the traction companies, after a hearing before our State commission, to go into the Federal courts and get an injunction tying up an order established by our State commission.

Mr. GRAHAM. Was there any motion to dissolve that ex parte order?

Mr. ETTELSON. Yes; I will get to that a little later. There was.

Mr. YATES. The State commission first made it five and then six.

Mr. ETTELSON. Let me give you a recital of that. In the 1907 ordinance everything went along without trouble until 1917, when the traction companies made an application to the State public utilities commission of the State of Illinois for an increase in car fare. In 1919 that application was allowed by the State public utilities commission and the fare was increased from 5 to 7 cents.

Mr. GRAHAM. By whom?

Mr. ETTELSON. By the State public utilities commission of the State of Illinois. Then the city of Chicago, in accordance with the provisions of the State public utilities law, as it then existed, prayed an appeal to the circuit court of Sangamon County. Sangamon County is the county the distinguished Congressman comes from, Mr. Yates, where the capital of the State is located.

Mr. YATES. The law required that all appeals shall go to the Sangamon County court.

Mr. ETTELSON. Exactly. At that time the circuit court of Sangamon County reversed the action of the State public utilities commission of the State of Illinois, in increasing the car fare to 7 cents, and the traction companies took an appeal to the Supreme Court of Illinois, which in turn reversed the judgment of the circuit court of Sangamon County and sustained the action of the State public utilities commission of the State of Illinois. From the judgment of the Supreme Court of Illinois, which held that the State by virtue of the exercise of the police power might intervene and alter the car fare as fixed in these contracts, the city of Chicago took an appeal to the Supreme Court of the United States, and the Supreme Court of the United States sustained the judgment of the Supreme Court of Illinois, feeling that it was bound by the decision of the Supreme Court of Illinois in construing the provisions of the constitution and statutes of the State of Illinois. Subsequently the traction companies went before the State public utilities commission of Illinois, filed another petition for an increase, and obtained from the State public utilities commission of the State of Illinois an increase from 7 to 8 cents, and the people are now paying the 8-cent car fare.

Mr. YATES. Is that by order of the new State commerce commission, which was the successor of the State public utilities commission?

Mr. ETTELSON. No; the State public utilities commission, just as I have stated. We took an appeal on behalf of the city of Chicago from the 8-cent car fare holding of the State public utilities commission of the State, and that case is pending and undisposed of in the State courts. Last year an application was made by William Hale

Thompson, mayor of the city of Chicago, on his own behalf and on behalf of the people of Chicago, for a reduction of the car fare from 8 cents to 5 cents, and that application was made to the present Illinois State Commerce Commission of the State of Illinois, really just a change in name of the commission, and, perhaps, to some extent in the powers of the commission. The application was duly presented.

Mr. MICHENER. How about the personnel?

Mr. ETTELSON. Different. Under the new governor of Illinois the personnel was completely changed. The members added make it seven now, formerly five. A hearing was had on notice, which lasted practically from July until October, almost continuously. The city was put to the expense of tens of thousands of dollars in presenting that case to the commerce commission, because that is only one of the many diversified utilities operating in Chicago. The law department were compelled to have lawyers specially employed, compelled to have experts on valuations, and so forth. As I say, that hearing lasted five or six months. Over 4,000 pages of testimony were taken in that hearing, and the reduction from 8 to 5 cents resulted. The present Illinois State public utilities law, which creates the State commerce commission, provides an adequate appeal by either party that feels itself aggrieved by action of the commerce commission, an appeal to the circuit court of Cook County, where Chicago is located, because this was a Chicago controversy, and then appeal to the supreme court of the State.

Mr. SUMNERS. Pending the appeal, what is done with reference to the rate?

Mr. ETTELSON. I will tell the Congressman about that. I am glad you asked that question. When the traction companies win the people are forced to pay the increased car fare under our present system of government. When the people win the traction companies continue to gouge the people out of $60,000 a day.

Mr. SUMNERS. Do your refer to the State system of procedure?

Mr. ETTELSON. And Federal. I am talking about both. I am talking about the results.

Mr. GRAHAM. How does the Federal system touch that question?

Mr. ETTELSON. In this way.

Mr. GRAHAM. There seems to be a controversy between two State boards.

Mr. ETTELSON. No; I will tell you how the Federal courts get in. When the people secure a reduction from 8 cents to 5 cents by the commerce commission, mind you, if the decision had been against the people, under our State law, they would have been compelled to go into the State court, first, the circuit court of Sangamon County, then the Supreme Court of Illinois, and then the Supreme Court of the United States, on some Federal question that might arise. The people are compelled to go to the State court, but what do the traction companies do? When the nickel carfare was ordered by the State commerce commission they immediately rushed into the Federal court and got a Federal judge on Thanksgiving Day to issue an injunction tying up the nickel car fare and permitting the traction companies to go on and charge the people 8 cents.

Mr. SUMNERS. If they had proceeded to the State court under an appeal, what effect would there have been with reference to the fare under that decision?

Mr. ETTELSON. The 5-cent car fare would have remained in effect.

Mr. SUMNERS. No; you had 8 cents.

Mr. ETTELSON. Eight cents, but they reduced it to 5; got it down to 5 by the State commerce commission. Then, as I remember the provisions of the law, the 5-cent car fare would have remained in effect, or the traction companies would have been compelled to execute bond with surety to secure the people for the overcharges made in the excess car fare, representing the difference between the 5 and the 8 cents. This Federal judge saw fit, in his wisdom, if you please, to enter that injunction and require a bond, a nominal bond of $50,000, in connection with the injunctional order, although the excess car fare of 3 cents is $60,000 every day.

Mr. MICHENER. Those two raises that were given by the old utility board were given in what space of time, beginning with the first raise?

Mr. ETTELSON. The 7-cent fare was in August, 1919.

Mr. MICHENER. From that time down to the time the personnel of the board changed the fares had been continuously raised?

Mr. ETTELSON. Yes, sir.

Mr. MICHENER. And after a due hearing before your State supreme court?

Mr. ETTELSON. No; the State commerce commission.

Mr. MICHENER. No; I think I am right. Before the State supreme court and the Supreme Court of the United States, the decisions of the board, the utilities commission, raising the fares, had been affirmed.

Mr. ETTELSON. Yes, sir.

Mr. MICHENER. You then proceeded to adopt the new State law, and the construction of a new board with new ideas.

Mr. ETTELSON. Yes, sir.

Mr. MICHENER. That was an issue in the selection of the new public utilities commission or commerce board?

Mr. ETTELSON. They are appointed by the governor.

Mr. MICHENER. Their views were well known as to public utility questions and were considered at the time they were selected?

Mr. ETTELSON. I would hardly go as far as that. I would say this: The members were in embryo at that time. I do not suppose the governor of the State would take the public into his confidence as to whom he was selecting.

Mr. MICHENER. That was common talk in Chicago, was it not?

Mr. ETTELSON. Conditions changed. You must remember that the traction companies made their application originally on the ground that the war conditions required an increase in car fare.

Mr. MICHENER. After this new public utilities commission or commerce board is in power they reduced the 8 cent rate which had been raised in 1919, to 5 cents.

Mr. YATES. What was the date of that?

Mr. ETTELSON. November 23, 1921, last year. The Governor was elected the previous November, the year before.

Mr. MICHENER. Has there been any change in the courts there since the first decision of the supreme court?

Mr. ETTELSON. No changes in the personnel of the Supreme Court of Illinois: no.

Mr. MICHENER. Now, you object because the utility companies go into the Federal court?

Mr. ETTELSON. Because we say that is tantamount to the denial to the people of Chicago of the equal protection of the laws, because the people go before the State commerce commission for a hearing that lasts five or six months, and succeed in getting a record of 4 000 pages of testimony—sworn to—which persuaded the commerce commission that the reduction in car fare should be made from 8 cents to 5 cents, and the State law requires the traction companies to go into the State courts to contest that rate, and appeal can be had to the circuit court of Cook County on the record made before the commerce commission, and appeal can be had from the judgment of the circuit court of Cook County to the Supreme Court of Illinois, and from that court to the Supreme Court of the United States on any question of the invasion of the rights of any person under the provisions of the Constitution.

Mr. MICHENER. But the question that has been bothering me has been one of expediency, of policy, whether or not it was the right thing under the Constitution for Congress to deny to the public utility the right to go before a court and have matters determined which are not determined in the beginning by a board selected for a particular purpose.

Mr. ETTELSON. Then I will tell you what they ought to do, in my opinion. It should not be in the power of any Federal court to take 4,000 pages of testimony that consumed in their taking five or six months before a commerce commission where both sides were heard in this controversy; it should not be in the power of any Federal judge, and I am not criticizing the particular Federal judge—I am talking against the system—to take that record and dump it in the wastebasket and say on a bill of complaint that an injunction should issue tying up the rate of fare established by the Commerce Commission.

Mr. YATES. Was it ex parte?

Mr. ETTELSON. The original injunction or order, yes; that was issued on Thanksgiving Day without any hearing of anybody; except on a bill of complaint and hearing given to the traction company on the face of the bill, and subsequently affidavits were presented in open court on both sides in an effort to set aside—as they call it—in the first instance, to enjoin, a restraining order, issued by the judge. We say it is inequitable and unfair to compel the people to go into the State courts; to go into that extensive hearing; to go to all this expense, and then have the traction companies rush into the Federal court to tie up the rate established by the commerce commission If Congress is going to intervene and, if you please, chase the people from the State court to the Federal court, and from the Federal court to the State court, then I say that the Federal court should take complete jurisdiction and control of every controversy of rates between any utility company and any municipality or its people, whether that utility company be engaged in interstate commerce or intrastate commerce. In other words, not divide the authority between inferior State courts and an inferior Federal court, but put it one place or the other, so that the traction companies do not always have the advantage of the people, so that "it is heads I win, tails you lose," with the traction companies. That is what we are contending for.

We say that the traction company has its right and its remedy in the State courts, in the Supreme Court of the State of Illinois, and it may take an appeal if the decision is adverse to it—they won in their other hearing—taking an appeal to the Supreme Court of the United States, to decide some Federal question that arose under the Constitution of the United States. It certainly should be a principle that should control the traction companies as well as the people, that he who seeks equity must do equity, and you will find, if you study the question, that in Columbus, Ohio, there was a traction company that got into the predicament where it said it could not operate under the rates of fare fixed by ordinance of the city of Columbus. The traction company filed a bill in the Federal court asking the aid of the Federal court, that the traction company might go on and operate and have a fare not established by ordinances, and that traction company offered to surrender the franchises it received from the people of the city of Columbus as a condition precedent to the intervention of the court of equity in that case.

What do the traction companies in the city of Chicago say? They say, yes; we have canceled the provision for the nickel car fare that the people wanted and that we promised the people. We are not living up to the provisions, if you please, with reference to the service in that ordinance, and we still insist that the rest of the contract be maintained inviolate, and we are entitled to its preservation. In other words, they say that though the nickel car fare is wiped out they still have the right to operate their street cars in the city of Chicago under the grant made by the people of the city to the traction company in 1907.

Mr. FOSTER. Did not the Illinois Supreme Court say that?

Mr. ETTELSON. No, sir; they did not.

Mr. FOSTER. Did they not sustain the 7-cent car fare?

Mr. ETTELSON. No, sir; they did not say they had the right to continue; they said that the State had the right by virtue of the exercise of the police power in the public interest to alter the rate, that contracts were binding between the traction company and the city of Chicago, but that the State might step in under its police power and alter those rates of fare, and that is a far cry from saying that; and we have filed in the circuit court of Cook County, to cancel their contract because they had committed a breach of contract with the people. I do not believe any court in the land will say that a traction company can file an application to a tribunal and have the nickel car fare canceled and get 8 cents and have that court say that the balance of the contract is good, remaining in favor of the traction companies, or have the court say that the provisions in favor of the people were wiped out and the balance of the contract in favor of the companies shall be preserved. I do not believe any court of equity in the land will say that, and we filed a bill to cancel their contract because they had committed a serious breach in that contract.

Mr. YATES. In what court?

Mr. ETTELSON. In the circuit court of Cook County, and that is another reason. It is still pending and undetermined. We do not want any litigation in the Federal court because we say that a court of equity and the circuit court of Cook County is fully competent to pass on all the questions of equity involved between the people and the traction companies, and if the court takes hold for one purpose it may retain jurisdiction of the controversy for all purposes.

I can see where, perhaps, under the system that formerly prevailed whereby legislatures fixed a maximum rate, that the public service corporations might charge the people, fixed by the legislatures of the various States, that there would be good reason under the Federal law for the erection of a tribunal which would be composed of three judges who would have the power to enter an injunctional order against the enforcement of the legislative maximum rate, but, gentlemen, that is a far different situation from the situation that exists to-day in the various States, like Illinois, where they have the Illinois Commerce Commission, which does what? After a hearing lasting months it enters an order for a temporary experimental rate to see whether or not the traction companies can operate and make a profit, whether the rate shall be remunerative.

Mr. MICHENER. What is the result right there, if they should be mistaken?

Mr. ETTELSON. Because this contract, Congressmen, should be considered for the period of 20 years; and the traction companies agreed that if the rate of return were not sufficient in one year that the deficit might be made up in some subsequent year or subsequent years. Is there any man that can say where you have 2,000,000 car riders using the cars of the city of Chicago, in a city of 3,000,000 people, that the rate established now is absolutely confiscatory? There is only one way that we can judge, and that is by experience, and experience teaches us that a rate, perhaps, may be too low or too high, but conditions change so that it may be reasonable and remunerative. We know conditions change constantly. Why should that rate be enjoined under a

contract which says by its very terms that the traction company agreed that if they did not get a sufficient return in one year they would get it in a subsequent year.

Mr. MICHENER. In view of that kind of contract, my question might not apply.

Mr. ETTELSON. Yes.

Mr. MICHENER. But assuming that that public utility did not in the first place enter into that kind of contract with those terms, what would happen to a public utility? Will Chicago with its new board say whether they can make money at 5 cents?

Mr. ETTELSON. The same thing might happen, did happen, to the people. Why not consider them? Why not give them the benefit of the doubt? Iam taking up the situation with which I am most familiar. I do not know the situation elsewhere. I say our situation in Chicago is sufficient to justify the enactment of this bill that will bring comfort into the hearts of two million people dissatisfied with the wrongs perpetrated by the traction company. Why should not the people get the benefit of it?

Mr. MICHENER. Assuming that the constitution of the United States guarantees to certain persons, to all persons, the right of property?

Mr. ETTELSON. Yes, sir.

Mr. MICHENER. Assuming that conditions should arise whereby those people that you refer to should be obliged to pay a slight increase in fare before it is known whether or not it is confiscatory, would you be in favor——

Mr. ETTELSON. I would be in favor of granting to the utility companies to do what the traction company did in the Columbus case, come in and honestly offer to surrender its grant and say, we can not go on and operate; we are looking for aid from some court. I would not be in favor of giving a traction company aid in perpetrating a wrong against the people. I would consider the people first, and I do not think you would be working harm to any utility company that refuses to live up to its contract and at the same time insists upon an increase in car fare.

Speaking of maintaining a rate that was alleged to be confiscatory for a period of time, the New York Supreme Court in the case of the Municipal Gas Co. *v.* the Public Service Commission, 225 N. Y., page 89, said:

"It will seldom be important that rates have been inadequate for a day or a week or a month. Fleeting losses may be suffered and yet the balance sheet may show a profit. Prolong the loss, however, for a year and you may reach and cross the danger line. It is by the average of the year that business commonly reckons its losses and its gains. On the other hand, there may be times when the average must be distributed over periods still longer."

And in reading the account of your proceedings at a former hearing some one referred to the Los Angeles case, the telephone case, and the recital of the facts by the court in that case showed that the telephone company had operated for a full year, the year previous to the time the litigation arose, under the rates administered to determine whether those rates would prove remunerative or not.

Mr. CHANDLER. When you speak of the discomfort of 2,000,000 people, is it a matter of delay of the law in appealing to the Federal court for an injunction or is it because the Federal courts are enemies of the comforts of the people? How is that?

Mr. ETTELSON. No.

Mr. CHANDLER. There is a contention made that the Federal courts are very dear to the people as well as the State courts. Why come in and say that the Federal courts can jeopardize the comforts of two millions of people in Chicago? Is it a defect in our system, in the governmental situation, in the procedure?

Mr. ETTELSON. Exactly.

Mr. CHANDLER. Is it not true that the Federal courts are unfriendly to the people?

Mr. ETTELSON. I am not charging that the Federal courts are friendly or unfriendly to the traction companies, or friendly or unfriendly to the people. I assume that they will do their duty as we endeavor to do our duty as public officials, but I will say that the system is wrong which gives the traction companies a great advantage over the people of our city and denies to our people the equal protection of laws because they can not get into the Federal courts; and they render, by action of the Federal court in granting an ex parte injunction, the action of the State commerce commission on a hearing for a good many months, render all that nugatory.

I am perfectly willing to have the jurisdiction one place or the other if it can be constitutionally worked out and let the Federal courts have jurisdiction, but when the case goes into the Federal court and a judge entertains that injunction and there shall be hearing in the court lasting four or five months, where the people may have a chance to be heard with equal opportunity with the traction company and evidence taken on both sides before the judge or a referee, so that all that expense and labor is not rendered null. That is what we are pleading for, whether it is to go to one place or another. We think that the State courts are competent to pass on Federal questions that may be involved, arising under the constitution of the State and the laws of the

State, and the Supreme Court of the United States says that the State courts are perfectly competent to pass on those questions involving the poor down-trodden traction company in our city that has made this $100,000,000 profit. If it is dissatisfied with the action of the State courts it can go into the Supreme Court of the United States on the question of the invasion of the rights of the traction company by the State authorities and have that Federal question under the Constitution of the United States passed upon by the Supreme Court of the United States.

Mr. GRAHAM. May I ask you there how they can do that? That is, have the question of the confiscatory effect of an order determined by the Supreme Court of the United States in an appeal from the supreme court of the State?

Mr. ETTELSON. By alleging before the circuit court that the action of the Commerce Commission was a violation of the provisions of the constitution of the State of Illinois, if you please, and of the provisions of the Constitution of the United States.

Mr. GRAHAM. You know very well that the Supreme Court will not sit to hear any question of fact.

Mr. ETTELSON. Why should not the Supreme Court of the United States pass on the record made before you gentlemen?

Mr. GRAHAM. I am asking you as a lawyer. Do not evade it, please.

Mr. ETTELSON. That is the present practice. I am trying to answer it with my feeble ability.

Mr. GRAHAM. I will be glad to wait for you to answer it. I am asking you this question. Do you not know as a lawyer that in an appeal to the Supreme Court of the United States only the questions of law that are raised by the record are considered by that court, and the question of fact is not determined by that court?

Mr. ETTELSON. Then you can change that by your act of Congress. You have that power.

Mr. GRAHAM. I am asking you now if it is not the fact to-day?

Mr. ETTELSON. That is the fact to-day.

Mr. VOLSTEAD. Is it a fact? The question of fact very often becomes a question of law. Wherever there is a question whether a rate of compensation deprives a public service corporation of property without due process of law, the court has to examine facts for the purpose of determining whether it actually does accomplish that thing.

Mr. ETTELSON. There seems to be a difference of opinion among the learned lawyers of the committee. I will tell you what I think in my humble way. I believe that when we appeared in the Supreme Court of the United States—I did not have the honor to appear there because my duties require me to stay in the office, but I have assistants who appeared—let me tell you what happened. The commerce commission appeal in our State court to the circuit court of Cook County, and the circuit court of Cook County under our practice is required to pass on the lawfulness and reasonableness of the rate established by the Commerce Commission. The record was made up by the circuit court of Cook County and the Supreme Court of Illinois passes on that record on questions of fact that arise, so that record was made and any questions of law that are involved are transmitted to the Supreme Court of Illinois, and the Supreme Court of the United States acts on questions of fact as they find them and solve them on the record made and on the questions of law that arise. That is the present practice. What I meant to say, Congressman, is that there is no hearing of witnesses in any place under our present practice.

Mr. GRAHAM. You mean to say more than that. I think you meant to say that the conclusion of fact as found in the court below was and would be controlling in the Supreme Court.

Mr. ETTELSON. The Supreme Court of the United States. I would not want to say that is so. I think they would have the right to examine the record, but if it is so, the Congress of the United States has the power to change that practice.

Mr. VOLSTEAD. I have some doubt about it.

Mr. ETTELSON. I am going to read you a provision of the Constitution of the United States as follows:

"In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdicton, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

Did you hear that, Congressman?

Mr. VOLSTEAD. I heard it.

Mr. ETTELSON. Let me read that again:

"In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction.

In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

In other words, you can absolutely control that by an enactment with reference to appellate procedure as to how far the Supreme Court of the United States may inquire into the facts. That is what this case would be, an appellate case, appealed from the Supreme Court of Illinois to the Supreme Court of the United States, so there is really no difficulty on that if they want to go into the facts. You gentlemen have the power to pass a law of that character and change the practice.

Mr. YATES. A question along that line. In the hearings the other day, when you were not here, it was advanced by one gentleman as a serious contention that if these matters remained—in other words, if the State controls the procedure, that the excessive delay would result, that the delays in the State were enormous, and on page 132 of the hearings Mr. Ransom said, "Two years is conservative." I served three years on the State public utilities commission and we never had a case that was prolonged two years. Do you know of any?

Mr. ETTELSON. Let me read you the dates and that will answer your question.

Mr. FOSTER. Mr. Ransom's statement covered the whole procedure from beginning to end.

Mr. YATES. He said the State commissions thought nothing of taking a case under advisement for two years.

Mr. ETTELSON. The courts of Illinois move very expeditiously, I am proud to say. August 8, 1919, the State public utilities commission increased the rate to 7 cents. October 3, 1919, the circuit court of Sangamon County set aside the order of the public utility commission after a full hearing. February 18, 1920, the State supreme court reversed the decision of the circuit court of Sangamon County and affirmed the order of the public utilities commission. That was all within six months, to go to the highest court of the State and get a decision. I will tell you there is a provision in our law which gives an order of this character increasing or decreasing rates charged by public-service corporations precedence over other cases, that is, puts it in the breast and conscience of the court to expedite the hearing and advance the case on account of its great public character, its important public character, ahead of other cases.

Let me read you briefly some of ths decisions. I am not asking you to take my word on the law, because I am comparatively a stranger to most of you. Let us see what the courts of the United States have said:

The case of Turner *v.* Bank of North America, 4 Dallas (U. S.) 8, was an action brought upon a promissory note by an indorsee against the maker, in a Federal court, on the ground of diverse citizenship. The indorsee and the maker were citizens of different States, but it did not appear from the record that the original payee was a citizen of a different State from that of the maker. The circuit court gave judgment for the plaintiff, but the Supreme Court of the United States reversed that judgment, holding that the court was without jurisdiction under the judiciary act, which only gave the Federal court jurisdiction in such cases if the payee as well as the indorsee was a citizen of a different State from that of the maker, notwithstanding that the Constitution says that the judicial power of the United States shall extend to controversies between citizens of different States. The attorney for the defendant in error has contended that—

"The circuit court is not, in technical language or intendment, an inferior court. The judicial power is the grant of the Constitution, and Congress can no more limit than enlarge the constitutional grant."

But Mr Justice Chase answered this argument thus:

"The notion has frequently been entertained that the Federal courts derive their judicial power immediately from the Constitution; but the political truth is, that the disposal of the judicial power (except in a few specified instances) belongs to Congress. If Congress has given the power to us, we possess it, not otherwise; and if Congress has not given the power to us, or to any other court, it still remains at the legislative disposal. Besides, Congress is not bound, and it would, perhaps, be inexpedient, to enlarge the jurisdiction of the Federal courts to every subject, in every form, which the Constitution might warrant."

In the case of Sheldon *v.* Sill, 8 How. (49 U. S.) 441, the question was raised whether the judiciary act of 1789 was not unconstitutional, in that it withheld from the circuit courts of the United States certain judicial powers which by the Constitution were ceded by the States to the United States. But the Supreme Court said:

"It must be admitted, that if the Constitution had ordained and established the inferior courts, and distributed to them their respective powers, they could not be

restricted or divested by Congress. But as it has made no such distribution, one of two consequences must result—either that each inferior court created by Congress must exercise all the judicial powers not given to the Supreme Court, or that Congress, having the power to establish the courts, must define their respective jurisdictions. The first of these inferences has never been asserted, and could not be defended with any show of reason, and if not, the latter would seem to follow as a necessary consequence. And it would seem to follow, also, that, having a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred on another, or withheld from all.

"The Constitution has defined the limits of the judicial power of the United States, but has not prescribed how much of it shall be exercised by the circuit court; consequently, the statute which does prescribe the limits of their jurisdiction can not be in conflict with the Constitution unless it confers powers not enumerated therein.

"Such has been the doctrine of this court since its first establishment. To enumerate all the cases in which it has been either directly advanced or tacitly assumed would be tedious and unnecessary."

In the case of Turner *v.* Bank of North America (4 Dall. 10) it was contended, as in this case, that, as it was a controversy between citizens of different States, the Constitution gave the plaintiff a right to sue in the circuit court, notwithstanding he was an assignee within the restriction of the eleventh section of the judiciary act. But the court said:

"The political truth is, that the disposal of the judicial power (except in a few specified instances) belongs to Congress, and Congress is not bound to enlarge the jurisdiction of the Federal courts to every subject in every form which the Constitution might warrant. This decision was made in 1799. Since that time the same doctrine has been frequently asserted by this court, as may be seen in McIntire *v.* Wood (7 Cranch 506); Kendall *v.* United States (12 Peters, 616); Cary *v.* Curtis, (3 Haward, 45).

In the case of the sewing machine companies, 18 Wall. (85 U. S.) 553, an action of assumpsit was brought in a Massachusetts State court by the Florence Sewing Machine Co., a Massachusetts corporation, against three other sewing machine companies, one of them a citizen of Massachusetts, one of Connecticut, and one of New York. The Connecticut company petitioned to have the case removed to the Federal court, on the ground of diverse citizenship. The application was denied on the ground that the judiciary act permitted such removal only when all the parties on one side were citizens of different States from the parties on the other side. The said defendant then sued out a writ of error to the Supreme Court of the United States, contending that the judiciary act was, in that regard, an unlawful limitation upon the rights conferred upon the defendant by the Constitution. But the Supreme Court of the United States said:

"Circuit courts do not derive their judicial power immediately from the Constitution, as appears with sufficient explicitness from the Constitution itself, as the first section of the third article provides that the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. Consequently the jurisdiction of the circuit court in every case must depend upon some act of Congress, as it is clear that Congress, inasmuch as it possesses the power to ordain and establish all courts inferior to the Supreme Court, may also define their jurisdiction. Courts created by statute can have no jurisdiction in controversies between party and party but such as the statute confers. Congress, it may be conceded, may confer such jurisdiction upon the circuit courts as it may see fit, within the scope of the judicial power of the Constutution, not vested in the Supreme Court, but as such tribunals are neither created by the Constitution nor is their jurisdiction defined by that instrument, it follows that inasmuch as they are created by an act of Congress it is necessary, in every attempt to define their power, to look to that source as the means of accomplishing that end. Federal judicial power, beyond all doubt, has its origin in the Constitution, but the organization of the system and the distribution of the subjects of jurisdiction among such inferior courts as Congress may from time to time ordain and establish, within the scope of the judicial power, always have been, and of right must be, the work of the Congress."

In the case of United States *v.* Union Pacific R. R. Co. (98 U. S. 569), there was involved the validity of a certain special act of Congress authorizing the Attorney General to bring suit, in any circuit court of the United States, against the Union Pacific Railroad Co., and the subscribers to its capital stock, to recover moneys frau-

dulently obtained in the so-called Credit Mobilier scandal. The Attorney General instituted such suit in Connecticut. The company contended that the statute under which the suit was brought was unconstitutional, because it was a special act for the trial of a special case; that the company was denied equality before the law in being thus forced to appear in a court of a distant State; and in being denied the privilege of the usual form of procedure established for the trial of equity cases. But the supreme Court overruled these contentions, saying:

"We say, therefore, that, with the exception of the Supreme Court, the authority of Congress, in creating courts and conferring on them all or much or little of the judicial power of the United States, is unlimited by the Consititution.

"This court said, in the case of The Bank of Columbia *v.* Okely (4 Wheat. 235), in speaking of a summary proceeding given by the charter of the bank for the collection of its debts: It is the remedy, and not the right, and as such we have no doubt of its being subject to the will of Congress. The forms of administering justice, and the duties and powers of courts as incident to the exercise of a branch of a sovereign power, must ever be subject to legislative will, and the power over them is unalienable, so as to bind subsequent legislatures."

The case of Holmes *v.* Goldsmith (147 U. S. 150) was an action brought in the United States circuit court by the indorsee of a promisory note against the maker thereof. The maker and indorsee were citizens of different States, but the maker and payee were citizens of the same State, and the United States judiciary act did not confer jurisdiction upon the Federal courts in such cases. It was contended that this was an improper limitation upon rights conferred by the Constitution. But the Supreme Court said:

"Upon the face of the complaint the jurisdiction of the circuit court was duly made to appear so far as the requisition of the Constitution apply. But it has been held, in a series of cases beginning with Turner *v.* Bank of North America (4 Dall. 8), that it is competent for Congress, in creating a circuit court and prescribing the extent of its jurisdiction, to withhold jurisdiction in the case of a particular controversy."

The court then quotes the following from Sheldon *v.* Sill (8 How. 441, 448):

"The Constitution has defined the limits of the judicial power of the United States, but has not prescribed how much of it shall be exercised by the circuit court; consequently, the statute which does prescribe the limits of their jurisdiction can not be in conflict with the Constitution unless it confers powers not enumerated therein.

The court continues:

"The doctrine has remained unchallenged, and has been assumed for law in numerous cases, which it is unnecessary to cite."

In ex parte Wisner (203 U. S. 449) a citizen of Michigan brought an attachment suit against a citizen of Louisiana in a State court in Missouri. The defendant petitioned for a removal of the case to the United States circuit court on the ground that it was a controversy between citizens of different States within the language of the Constitution. The latter court then assumed jurisdiction. Upon the application of the plaintiff the Supreme Court of the United States, however, issued a writ of mandamus to the circuit court commanding it to remand the case to the State court on the ground that under the judiciary act suits can not be removed to the Federal court if neither of the parties are citizens of the State in which the suit is pending. The Supreme Court said:

"The Supreme Court alone possesses jurisdiction derived immediately from the Constitution, and of which the legislative power can not deprive it (United States *v.* Hudson (7 Cranch 32)); but the jurisdiction of the circuit courts depends upon some act of Congress. Turner *v.* Bank (4 Dall. 8, 10); McIntire *v.* Wood (7 Cranch 506, 507); Sheldon *v.* Sill (8 How. 441, 448); Stevenson *v.* Fain (195 U. S. 165, 167.)"

In United States *v.* Burlington, etc., Ferry Co. (21 Fed. 331), the court said:

"In order to give jurisdiction to a Federal court in any case whatever the Constitution and the statute law must concur. It is not sufficient that the jurisdiction may be found in the Constitution or the law. The two must cooperate; the Constitution as the fountain, and the laws of Congress as the stream from which and through which the waters of jurisdiction flow to the court. This results necessarily from the structure of the Federal Government. All powers not granted by the Constitution to the Federal Government nor prohibited to the States are reserved to the States or the people. The great residuum of legislative, executive, and judicial power remains in the States."

In Defiance Water Co. *v.* Defiance (191 U. S. 184) the Supreme Court said:

"The State courts are perfectly competent to decide Federal questions arising before them and it is their duty to do so. Robb *v.* Connolly (111 U. S. 624, 637); Missouri Pacific Railway Co. *v.* Fitzgerald (160 U. S. 556, 583). And, we repeat, the presumption is in all cases that the State courts will do what the Constitution and laws of the United State require. Chicago & Alton Railroad *v.* Wiggins Ferry Co.

(108 U. S. 18); Shreveport *v.* Cole (129 U. S. 36); Neal *v.* Delaware (103 U. S. 370. 389); New Orleans *v.* Benjamin (153 U. S. 411, 424)."

In this case a bill in equity had been filed in the Ohio State court and a preliminary injunction was granted. They then filed a bill for relief in the United States circuit court on the constitutional ground that the company was deprived of its property without due process of law, contrary to the fourteenth amendment. The circuit court assumed jurisdiction but finally dismissed the bill on other grounds. The Supreme Court of the United States, however, reversed that judgment, and remanded the case to the circuit court with instructions to dismiss the bill for want of jurisdiction.

In Missouri Pacific Railway *v.* Fitzgerald (160 U. S. 556, 583) the court said:

"It must be remembered that when Federal questions arise in causes pending the State court those courts are perfectly competent to decide them, and it is their duty to do so."

In Robb *v.* Connolly (111 U. S. 624; 637) the court said:

"A State court of original jurisdiction, having the parties before it, may, consistently with existing Federal legislation, determine cases at law or in equity arising under the Constitution or laws of the United States, or involving rights dependent upon such Constitution or laws. Upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them; for the judges of the State courts are required to take an oath to support that Constitution, and they are bound by it, and the laws of the United States made in pursuance thereof, and all treaties made under their authority, as the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding. If they fail therein, and withhold or deny rights, privileges, or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the State in which the question could be decided to this court for final and conclusive determination."

Now, gentlemen, something I have said about the possibility of bringing comfort into the hearts of the people. I want to say that, like you gentlemen, I have had some experience in public life and, if you will pardon reference to myself, I have been a member of the State Senate of Illinois for 16 years and am still a member of that body, and perhaps in my feeble way I have learned something about public opinion, having been elected four times to that office, and I honestly believe and firmly assert that there is unrest in the hearts and minds and souls of the people of this country at this time; that there is great dissatisfaction existing among the people and that the vote had in recent primaries in various States to my mind means that the people are protesting against the conditions under which they now groan, and that to some extent at least their confidence in their public officers, their Government officers, has been somewhat impaired and destroyed; and I think that there is no enactment that the present Congress of the United States can put upon the Federal statute books which will do more to restore into the hearts of the common people, of whom Abraham Lincoln said that "the Lord must have loved the common people because he made so many of them"—there is no enactment that you gentlemen in your legislative establishment could put upon the Federal statute books that would do more to convince the poor people of Chicago and other great municipalities in their controversies with these great, giant corporations that are supposed to serve the people; nothing can do more to put confidence again into the hearts of the common people as far as their attitude toward their public officers and their Government is concerned than the passage of the Bacharach bill. I want to thank you for your patience.

STATEMENT OF MR. FREEMAN T. EAGLESON, OF COLUMBUS, OHIO, REPRESENTING OHIO BAR ASSOCIATION.

Mr. GRAHAM. Give your name and whom you represent to the stenographer.

Mr. EAGLESON. Freeman T. Eagleson, Columbus, Ohio. I appear in opposition to this bill pursuant to a letter from the president of the Ohio State Bar Association, and as chairman of the legislative committee of that association, and, further, in accord with my own personal views. I desire to discuss this bill briefly with reference to its unconstitutionality and its inexpediency.

First, I might say that this bill should be neither enacted into law nor rejected, because the State Public Utilities Commission of New Jersey is aggrieved at three United States judges for having temporarily modified its order, under protection of a bond, pending final determination of the correctness of the commission's order with

reference to the fare to be charged by the Public Service Railway Co. of Newark, N. J.; nor because of the advocacy of the bill by the learned city attorney for Chicago, who has just preceded me. In this connection I may divert to say that the extended remarks of counsel for Chicago with reference to the recent Columbus street railway controversy with the city of Columbus, as bearing on this bill, are hardly supported by the record in that case. While I hold no brief for any railway company, I was interested in that controversy as a citizen and patron, and I may say that the controversies between the city of Columbus and the Columbus Railway Power & Light Co. afford no facts that would tend to support this proposed measure. Columbus Railway Power & Light Co. *v.* City of Columbus, Ohio (249 U. S. 669).

I think the record will prove the accuracy of my recollection that it was the contention of the Columbus Street Railway Co., that, on account of the economic conditions brought about by the war, it could not continue to operate on the authorized fare to it of eight tickets for 25 cents with universal transfers; and, failing to get relief, made a rather unusual and unsuccessful attempt to surrender its franchise. Later, the city council, after extended examination, changed the rate ordinance, making the legitimate rates 6 cents for one ticket, five tickets for 25 cents, with limited transfer. After an examination of the facts the city council apparently took what would seem to be the rational view, that you can not take all the blood out of the economic veins of a public utility, or any other industrial enterprise, and at the same time expect it to be able to meet the demands of a growing city for efficient and extended service; fair minds do not demand that, either in a campaign or in a more formal hearing.

Counsel for the city of Chicago has spoken at great length about the Chicago street railway controversy. From the public press, we are all more or less familiar with Mayor Thompson's controversy with the Chicago traction lines and from the recitation of which, attractive though it was, there would seem little or no argument germane to the question of whether or not this bill should become a law. The learned counsel made a very interesting observation when he said that in the first trip of that controversy through the courts, the supreme court of the State had sustained the contention of the street railway company as justified by the public service commission. And it appears that he, himself, had declined to submit to the final decree of a State Court of last resort; but had taken the case to the Supreme Court of the United States for review and, as it turned out, affirmance.

And this affirmance was the approval of the order of the public utilities commission. Then came State election in Illinois, in which Mayor Thompson and the street railway controversy in Chicago largely figured; a new legislature, and what may be termed a "ripper bill" was enacted, legislating out of office the members of the public utilities commission, whose finding was objectionable to the said Chicago officials. New commissioners were put in their places, and then the matter of fare to be charged by the Chicago railway system was again submitted and apparently reduced very promptly from 8 cents a ticket to 5 cents a ticket. The railway company, it seems, then went to the Federal court and obtained a restraining order preventing the putting into effect of the 5-cent rate until a judicial review might be had in the Federal court as to whether or not the last order of the utilities commission would not be confiscatory of the property of the company. Complaint against the Federal court is made by the learned attorney for Chicago in that the Federal court required but a $50,000 bond, which apparently was inadequate, when the temporary restraining order was granted. It is common knowledge to lawyers that only a temporary restraining order, and not an injunction, can be granted without a hearing after notice given and the right to be heard in open court. Counsel for Chicago does not say that he asked for larger bond or that the court evidenced an unwillingness to fix the bond sufficiently high so that in case it be found on final hearing that there should be a refund to the patrons the ability to make it would be guaranteed by the bond. His statement is very incomplete, although given with manifest feeling. His quoting Lincoln's affectionate reference to the "common people" is more pleasing than profitable, being hardly to the point. So from his argument it seems that if justice is to be the goal of both parties to the Chicago controversy, it might be well to have the case out of the local atmosphere in which the controversy rages and in the Federal court.

Now, if the committee please, by the provision of this bill the power of interlocutory injunction only is denied to the inferior Federal court, the case may be taken to the Federal court for final determination, the same as now. The litigation may be protracted or abbreviated in the Federal court, as circumstance may demand.

Mr. CHANDLER. A representative from Chicago, of the corporation counsel, seems to have the impression that it can not go, in the first instance, to the Federal court, and said he is perfectly willing that it should go to one jurisdiction or another. Is it a fact that they may go in the first instance to the Federal court?

Mr. EAGLESTON. Yes; with a Federal question. But this bill does not restrict going into the Federal court. So that argument is aside from the language of the bill.

Mr. GRAHAM. Does it not amount to the same thing? The only purpose for which you would go into the Federal court and the only ground that would give it jurisdiction would be to issue an injunction, and if you take away the right of injunction, the injunctive remedy, there is nothing left to go into the United States court upon scarcely, and the evil would be accomplished long before there could be any decision rached in the case.

Mr. EAGLESTON. Yes; in effect that is it. It kills the efficiency of the Federal procedure by denying to the Federal court the right to make orders preserving the property pending the hearing.

Mr. GRAHAM. You are right in saying it could be taken there.

Mr. EAGLESTON. To illustrate: Suppose a case in the State court, from the final order of a public-service commission which violates the fifth or fourteenth amendment to the Constitution of the United States, or both; and by law you are denied the right to go into the Federal court to ask for injunctive relief to preserve the property pending the suit, and without which you fight it out through the State courts, and from the highest court of the State to the Supreme Court of the United States, and the proceeding lasts two or three years—pray tell me what becomes of the property involved in the controversy in the meantime? That would violate the law of the land; that would be an effective means for confiscation of property.

The law as it now is does not deny to the people or patrons of a public utility the right to have their interests protected. The injunction is accompanied by a bond fully providing for the refund of any excessive charge that may be found to have been collected pending the litigation.

The bill would deny equal protection of the laws, and the due process clause of the Constitution. In a proceeding in error from the highest court of the state to the Supreme Court of the United States, the latter court is bound by the findings upon issues of fact fully made in the court of last resort in the state. (Waters-Pierce Oil Co. *v.* State of Texas, 212 U. S. 86; Meidreich *v.* Lauenstein, 232 U. S. 236.)

This is so, save and except in an exceptional class of cases where what purports to be a finding of fact is not strictly such, but is so involved with and dependent upon questions of law bearing upon the alleged Federal right as to be a decision of those questions rather than a pure question of fact. (Kansas City Southern Ry. Co. *v.* C. H. Albers Commission Co., 223 U. S. 573; Portland Ry. Lt. & Power Co. *v.* Railroad Commission of Oregon, 229 U. S. 397.)

So it would seem that the scope of review of the United States Supreme Court is much narrower in a proceeding in error from the court of last resort in a state than it is on appeal from a Federal district court to the United States Supreme Court. This bill would deny the latter remedy.

Mr. CHANDLER. The review that has always been made implies that the Supreme Court passes on the question of law, but considers the facts. The case may be so interwoven that you can not consider the law without the facts, and suppose in considering the facts it is found that the rights of a citizen under the fourteenth amendment have been violated, and that he had not been duly protected, would they not declare the law unconstitutional if they were forced to render the decision by virtue of the terms of the law itself?

Mr. EAGLESON. No, Congressman Chandler; if I understand you, the line of decision of the Supreme Court makes a clear distinction between questions of fact decided by the State courts in a proceeding in error from the State court, and the record as it comes for review on appeal from the Federal court, subordinate to the United States Supreme Court.

Mr. CHANDLER. There was a case referred to—the Knoxville case.

Mr. EAGLESON. Yes; that important decision was discussed at a former hearing. Time forbids discussion of it here. But it may be said, in full answer to your suggestion that the Knoxville case went to the Supreme Court of the United States on appeal from a Federal district court, and that is my very point. That case supports my statement that in such an appeal the United States Supreme Court reviews the finding of facts as made by the Federal district court.

Let me say, gentlemen of the committee, that the distinction which I have sought to show is real, and of very great importance.

Mr. CHANDLER. It is a legal distinction. The Supreme Court does not again pass on it except in the light of the record, except when hypothetical cases are cited.

Mr. EAGLESON. No; they are not hypothetical. It is the very essence of due process of law.

The Federal Constitution provides that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." Again it says that Congress shall have the power "to constitute tribunals inferior to the Supreme Court." Then the Constitution provides, in article 3, that "the judicial power shall extend to all cases in law or equity, arising under that Constitution, etc." Without stopping to discuss whether the power to create carries with it the power to destroy, I beg to say that when Congress does create Federal district courts and permits them to exist, it can not, as was intimated by a member of this committee a moment ago, interfere with the inherent equity power of that court, which, while existing, is a part of the judiciary—an independent branch of the Government—without concurrently providing for the exercise of that same power in some other way. In other words, while Congress created the Federal district court pursuant to constitutional mandate, it has no power to either add to or take away from that court its equity powers. As was well said a moment ago, by the learned counsel for the City of Chicago, "If a court of equity takes a case for one purpose it has the case for all purposes." It is but to repeat to say that under our Constitution Congress can not, having created the Federal district court, and recognizing its existence, deprive it of its equity powers where Federal Constitutional questions are involved. Martin *v.* Hunter's Lessee, 1 Wheaton, 305; Home Telephone Co. *v.* Los Angeles, 227 U. S. 278.

Mr. CHANDLER. I understand you can not take equity away without destroying the court, but what answer have you to the statement of the corporation counsel of New York that it is perfectly proper to withdraw a certain distinct class of cases from the consideration of the court?

Mr. EAGLESON. I have not seen the memorandum of the gentleman.

Mr. CHANDLER. As a general proposition, can that be done?

Mr. EAGLESON. No; there are certain cases respecting which you can deny or limit the jurisdiction. For instance, where less than $3,000 are involved. But you can not withdraw or deny jurisdiction when a constitutional question is involved. There is a vast difference between the question of right to transfer a case from a State to a Federal court, and the question we are debating; yet learned counsel for the city of New York failed to note the difference. This bill is introduced and urged primarily because the public service commission of New Jersey resents an order of the Federal district court preserving the property of the corporation while the commission's finding is being reviewed, for the purpose of determining whether it be confiscatory. It is also being urged, for the most part, by those officials in New York and Chicago who are in desperate battle for political control in those two great cities. To accomplish their end they would abolish a court which has been a well-established, constitutional, and a satisfactory part of our judicial system for more than a hundred and thirty years.

The request for a statute of this character does not come from an unprejudiced source prompted by an even-minded effort to better our judicial procedure. Those who insist most upon its passage are those most disgruntled, because litigation has gone against them. It is the privilege of a litigant or lawyer, not always exercised, to condemn the court that decides against him.

In the case of Prentis *v.* Atlantic Coast Line Co., 211 U. S. 210, the rule is that the legislation may not be completed in State courts, and therefore judicial action would follow the legislative act of even the highest State court and may be begun in any court of general jurisdiction. See also case of Bacon *v.* Rutland R. R. Co., 232 U. S. 135.

The proponents of this bill have not anticipated the dilemma in which a statute like this one suggested would leave us.

Such a law as here proposed would cause extended litigation. Ben Avon Borough et al., decided June 1, 1920 (40 Sup. Ct. Rep. 527, 1920, P. U. R. A., Vol. E., p. 814), decision by Justice McReynolds, holds that if the State courts are not permitted to determine the question of confiscation according to their own independent judgment when reviewing the action of a commission in fixing the rate base of a utility, the due process clause of the Federal Constitution is violated; and this is especially so if the appeal specifically provided in the statute is the only clearly authorized proceeding, where the commission's order may be challenged because confiscatory. This would mean interminable litigation, as is illustrated in this case.

There is now no instance where Federal constitutional questions are denied access to Federal courts. This bill is the first serious threat against the constitutional safeguards, especially with reference to the fourteenth amendment, for the enforcement of which these Federal Courts were especially created. Again, if Federal jurisdiction

can be and is denied, as suggested in this bill, the Supreme Court of the United States must soon be overwhelmed with work and wholly unable to keep up with its docket.

In Ohio we have a great many commissions, to all of which this bill would apply. I now think of our public utilities commission, and our tax commission, with very broad powers. Then there is our industrial commission, and many others. We are apparently in the age of commissions. Yet this statute denies the right to go to the Federal court when the United States Constitution is violated by such board or commission, until he has run the gauntlet of the State courts, and regardless of whether or not in the meantime he gets his property rights protected therein. If Congress can enact this as a valid statute, then the State legislature might do the same for the State courts. Then, let me ask, what becomes of the constitutional safeguards to property? In Ohio, we started in 1906 with the railroad commission. Later, its jurisdiction was extended to include lighting plants, waterworks, gas plants, etc. The last legislature declared taxicabs and omnibuses to be public utilities and subject to regulations. The next step will be to take over the hotels of the country. Milk supply and distrubution will come in as a public utility for regulation. It is hard to conjecture the boundary of the thing. While the courts held invalid the Indiana coal commission act, in the case of Vandalia Coal Co. et al., 268 Fed. 572, because it violated existing contracts and the interstate commerce clause, it is not difficult to see the communistic possibilities in this character of legislation.

If this bill were a law, then every controversy over a subject within the jurisdiction of any board or commission would be taken to such and then to the State courts. The election of the State judges would soon depend upon whether they were for or against the policy of such boards and commissions. Under these conditions, and with the restraining power of the existing Federal court out of the way, as in this bill provided, the result is obvious.

In conclusion, gentlemen of the committee, speaking in the capacity designated and for myself individually, I ask you to refuse to give sanction to this bill so out of harmony with the Constitution of the United States and the welfare of the whole people of this country.

Mr. BACHARACH. I have a few letters and telegrams from various municipalities and one from the League of Texas Municipalities, also letters from 35 States, in which their governors state that the regulatory commissions of the State are favorable to the bill. It indicates to me that there are other places besides New York City and Chicago that are interested in this measure.

The preceding speaker, who is opposed to this bill, stated that only the cities of New York and Chicago are directly interested in this measure. That statement is not correct, and I wish to call attention to the fact that so far 34 States of the Union, either through their governors or regulatory boards, have favorably indorsed H. R. 10212, together with a number of individual cities, through their governing bodies or their various civic organizations, as evidenced in letters addressed to the Governor of New Jersey, and in resolutions which have been adopted, and which I ask leave to place in the record. All are agreed that this bill should be enacted into law, as their own experience has demonstrated that legislation of this character is important and necessary to the welfare of the individual States.

The governors of the following States have indorsed the bill: Arkansas, Georgia, Illinois, Indiana, Louisiana, Mississippi, Missouri, Nebraska, Rhode Island, South Carolina, Wyoming, Delaware, Maine, Maryland, Vermont, and Wisconsin.

The State regulatory commissions indorsing the bill are as follows: Arizona, Colorado, Florida, Idaho, Kansas, Michigan, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Oklahoma.

Since the last hearing the bill has been indorsed favorably by the following municipalities and civil organizations: League of Texas Municipalities; City Council of Long Beach, Calif.; city of Sacramento and the city of San Jose, Calif.

I also desire to file letters of indorsement from Edward W. Bemis, consulting engineer of Chicago, Ill., and the secretary of the New Jersey State League of Municipalities in conference with the Board of Estimate of the City of New York.

Mr. GRAHAM. The letters will be filed with the other papers bearing on this legislation.

I want to say this to the people who are in attendance: The committee has decided to adjourn until Thursday, June 8, 1922, at 10 o'clock a. m.

(Thereupon, at 1.45 o'clock p. m., the subcommittee adjourned to meet again Thursday, June 8, 1922, at 10 o'clock a. m.)

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